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Ihmiskunnalla on vain muutama vuosi aikaa saada vähennettyä päästöjään niin, ettei maapallon ilmasto lämpene vaarallisesti ja peruuttamattomasti. Ilmastolitigaatiossa on kyse oikeudellisten riitojen hyödyntämisestä ilmastotoimien jouduttamisessa. Kolmannen aallon ilmastokanteet ovat moninaisia argumentaatioltaan, ihmisoikeuslähtöisistä argumenteista hallintokanteisiin ja uusimpana kehityksenä yhtiöoikeudellisiin argumentteihin. Yhtiöoikeudellisten argumenttien alalajina yleistyy kannemuoto, jossa kantaja on osakkeenomistaja ja vastaaja yhtiön johto. Näissä kanteissa kyse on fidusiaarivelvoitteiden toteuttamisesta ja siitä, onko yhtiön johto täyttänyt huolellisuusvelvoitteensa analysoidessaan poliittista riskiä tehdessään fossiili-investointeja ajassa, jossa 196 valtiota noin kahdestasadasta valtiosta on oikeudellisesti sitoutunut vähentämään fossiilisia polttoaineita rajusti Pariisin ilmastosopimuksen puitteissa.

Fossiili-yhtiöt ovat hyödyntäneet investointisuojasopimuksia vaatiessaan vakiintuneen käytännön mukaan kompensaatiota investoinneilleen, joiden arvo on investoinnin vastaanottajavaltion johdosta laskenut tai menettänyt arvonsa. Energia-alan tärkein investointisuojasopimus, monenkeskinen Energiaperuskirja on myös erittäin litigoitu sopimus erityisesti EU-maiden sisäisissä investointiriidoissa. Viime vuosina on käyty EU-tuomioistuimen ja välimiesoikeuksien välillä kiista siitä, voiko investointisuojasopimuksia ylipäätään soveltaa EU-maiden sisäisiin kiistoihin EU-oikeuden ensisijaisuuden ja autonomian vuoksi. EU-tuomioistuin on tuoreessa oikeuskäytännössään Achmea/Komstroy todennut, ettei voi. Komstroy -tapauksessa vahvistettiin, että myöskään Energiaperuskirjan artikla 26(1) ei ole sovellettavissa EU-maiden sisäisiin kiistoihin, eli että investointisuojalauseke ei sovellu EU-maiden välisiin riitoihin.

Tätä taustaa vasten tutkimuskysymykset ovat, 1) mikä on Energiaperuskirjan investointisuojalausekkeen käytöstä poistumisen merkitys sille, kuinka energiasektorin yhtiöiden on arvioitava poliittista riskiä tehdessään liiketoimintapäätöksiä fossiilisijoituksista ja 2) mikä on kokonaiskuva fossiilisijoitusten lainmukaisuuden suhteen

EU:n sisällä, kun tarkastellaan yhtiön johdon huolellisuusvelvoitetta suhteessa kasvavaan ilmastoriskiin. Näihin kysymyksiin haetaan vastauksia 1) käymällä läpi kansainvälisen investointioikeuden logiikka sen syntytavan kautta ja asettamalla Energiaperuskirja tähän kontekstiin, 2) referoimalla EU-tuomioistuimen puitteissa käyty keskustelu, joka on johtanut Energiaperuskirjan 26(1) artiklan soveltamiskelvottomuuteen EU-maiden välisissä riidoissa, 3) analysoimalla yhtiön johdon huolellisuusvelvoitetta dynaamisena velvoitteena hallita riskejä ilmastokriisin ajassa ja 4) selvittämällä, mikä merkitys investointisuojalausekkeilla on yhtiöiden johdon mahdollisuuksissa hallita riskejä energiasektorilla. Päämetodina on lainoppi, mutta kontekstointi sijoittaa opinnäytetyön kriittisen oikeustieteen piiriin. Lisäksi on käytetty empiiristä international business -tutkimusta neljänteen osatutkimuskysymykseen vastaamiseksi.

Tavoitteena on osoittaa, että fossiilisijoitukset ovat paitsi Pariisin sopimuksen hengen vastaisia, myös vailla lain suojaa ainakin EU:n sisällä. Tämä johtuu siitä, että on mahdotonta täyttää yhtiön johdon huolellisuusvelvoite ja EU:n sisällä direktiivin 2014/95/EU:n vaatimukset (ilmasto)riskien analysoimisesta ja julkistamisesta ja samalla jatkaa fossiileihin investoimista. Kun investointisuojakin on poistunut viimeistään Komstroy -tapauksen myötä, pitäisi huolellisen yhtiönjohdon vetää se johtopäätös, että fossiilisijoitusten riskit ovat liian suuret. Opinnäytetyön argumentaatio on hyödynnettävissä ilmastolitigaatiossa.

Avainsanat: Energiaperuskirja, EU-oikeus, ilmastolitigaatio, johdon huolellisuusvelvoite, yhtiöoikeus, kansainvälinen investointioikeus, poliittinen riski

There are only a couple of years left to collectively cut emission so, that the global climate does not heat up dangerously and irreversibly. Climate litigation refers to utilizing legal disputes in order to speed up climate action. Third wave litigation are diverse in their argumentation, from human rights based argument to administrative arguments and the latest development, corporate law based arguments. A subcategory of the latter type is a dynamic where the shareholder sues the company directorship. These disputes are based on questioning, whether the company directorship has fulfilled its fiduciary duties and acted in due diligence in analyzing the political risk of investing in fossil energy, while 196 nations out of around 200 has legally bound themselves to radically cut the use of fossil fuels through the Paris Agreement.

Fossil companies have utilized international investment protection agreements in demanding compensation for their investment that have lost its value due to the activities of the host state. The most important investment agreement in the energy sector, the multilateral Energy Charter Treaty (ECT), has been utilized in intra-EU investment disputes a lot. In the past years, the Court of Justice of the European Union (CJEU) and various arbitral tribunals have had an ongoing dispute on whether investment protection agreements are applicable at all within the EU due to the primacy and autonomy of EU law. The Court has in its recent case law Achmea/Komstroy established, that investment agreements are not compatible with EU law in intra-EU cases. In Komstroy, it was confirmed that the ECT dispute settlement mechanism in Article 26(1) is not applicable in intra-EU disputes.

Against this background the research questions are 1) what is the significance of the ECT arbitration clause being removed to the energy business decision making in risk management within the EU, and 2) what is the overall assessment of the possibilities to invest in fossils while fulfilling the fiduciary duties in EU in relation to the growing climate risk. These questions are analyzed through 1) reviewing the logic of international investment and the ECT in this context, 2) accounting for the discussion in the auspices of the CJEU that has led to the rejection of the ECT Article 26(1) in intra-EU disputes, 3)

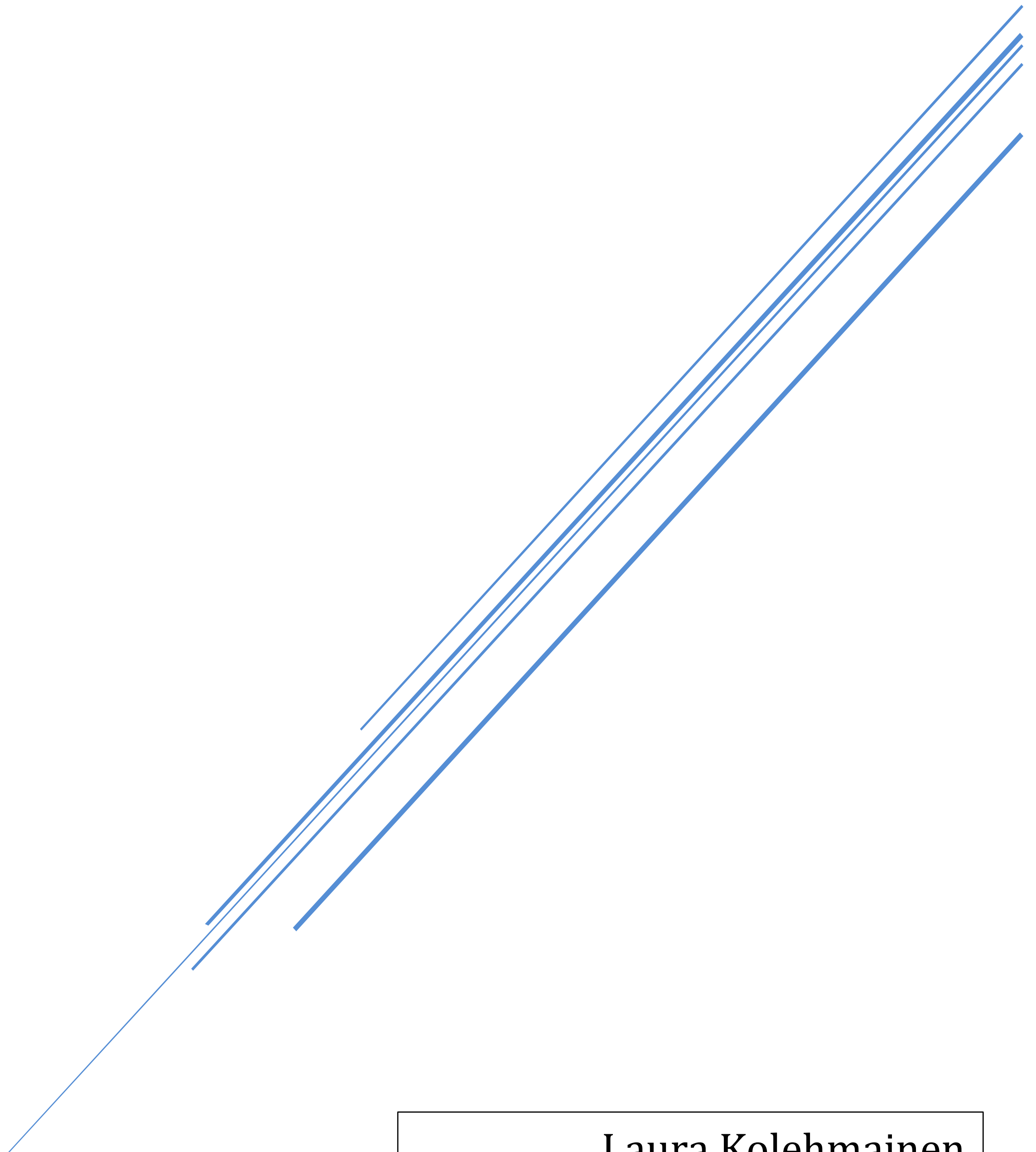
analyzing the fiduciary duty as a dynamic duty to manage risks in the era of climate crisis and 4) discussing the significance of investment protection clauses in managing risk in the energy sector as a part of fiduciary duties. The main method is doctrinal, but in the contextualization of the thesis critical approaches are utilized. Furthermore, in order to analyze the fourth sub-research question, empirical international business literature is utilized.

The aim is to show, that fossil investments are not only against the spirit of the Paris Agreement but also unlawful at least within the EU. This is because it is impossible to fulfill the fiduciary duties and the requirements of the Directive 2014/95/EU on non-financial disclosure on (climate) risks and continue investing in fossil energy. As the investment protection clause is unusable the latest after Komstroy, a diligent director will conclude that the risks in fossil investment are too big. The argumentation of this thesis may be utilized in climate litigation.

Key words: Energy Charter Treaty, climate litigation, fiduciary duty, corporate law, international investment law, political risk

WHO'S PAYING THE BILL FOR FABULOUS RISK TAKING?

A fiduciary duty argument against fossil investments in the era of global warming



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Foreword

During the time of starting to write this thesis in September 2021, the European energy crisis was still below the horizon. The Russian attack to Ukraine and the tensions leading up to it were yet ahead. As Russia has since cut the gas deliveries to Europe remarkably, the fossil gas-dependent Europe is struggling to ensure vital energy supply to its peoples and industries.[1] This has caused a steep rise in energy prices, strongest in fossil energy but not limited to it. One of the European Union (EU) countries in big trouble is the very gas-dependent Germany.[2]

Throughout the summer 2022, a lively discussion in the Finnish and German medias has taken place, about who should pay for the rising price of gas. Is it the German taxpayer, or the Finnish one? Or the energy companies that are bound by long-term contracts? [3] [4] [5] [6] [7] One of the biggest concrete cases of the "who should pay" discussion is unraveling in the case of the German company Uniper.

Uniper is a subsidiary to Fortum, a Finnish 51% state-owned energy company. Uniper is the biggest importer of gas in Germany, and especially German households are gas dependent. When writing this foreword in August 2022, the German government has taken steps towards emergency rationing of gas. There is

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[1] Energy security objectives have been on the agenda of the European Commission for decades, and the have become a priority the latest after Russia's attack in Ukraine in February 2022. See for example, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing in the EU, Brussels, COM(2014) 23 final/2. 17.3.2014, p. 2–4.
[2] Germany has decided to phase out nuclear energy and to replace it with renewables. The replacement has not been completely successful yet. https://world-nuclear.org/information-library/energy-and-the-environment/energiewende.aspx. Accessed 2.9.2022.
[3] Eg. Helsingin Sanomat. 20.7.2022. Pages A6-8.
[4] Helsingin Sanomat 21.7.2022. Pages A20-21.
[5] Yle https://yle.fi/news/3-12549580, Accessed in 5.8.2022.
[6] Frankfurter Allgemeine Zeitung 11.7.2022 Accessed in 5.8.2022. https://www.faz.net/aktuell/wirtschaft/uniper-finnland-gegen-weitere-finanzielle-hilfe-durch-fortum-18164430.html?GEPC=s6. Accessed in 5.8.2022.
[7] Die Zeit 11.7.2022 https://www.zeit.de/news/2022-07/11/finnland-gegen-weitere-finanzielle-hilfe-fuer-uniper?utm_referrer=https%3A%2F%2Fwww.google.com%2F Accessed in 5.8.2022.

not nearly enough gas in store for the upcoming winter, and the situation is prone to become dire according to the German minister of economy and climate, Robert Habeck.[8]

Uniper has gotten into massive financial trouble with the Russian company Gazprom refusing to deliver gas at an agreed price and its obligations towards German citizens. It has had to purchase gas at a current high market price, and Fortum has had to support it by a whopping 8 billion euros so far during the year 2022. To prevent Uniper from going bankrupt and further deepening the energy crisis, the German government has issued a multi-billion euro package to save it.

These billion euro losses and who should pay for them are the main interest in my thesis. A climate-wise timely energy transition inevitably means that there will be a lot of stranded assets[9] in the energy sector, in fossils business. Investments in fossil energy are still being made, and if the global community is to achieve its necessary-for-survival climate goals crystalized in the Paris Agreement, these investments cannot be let "pay themselves back" over the coming decades. The investments, then, will become losses. Stranded assets, then, are "assets that have suffered from unanticipated or premature write-downs, devaluations, or conversion to liabilities". [10] [11] [12] [13]

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[8] https://www.dw.com/en/german-economics-and-climate-minister-robert-habeck/av-62610429 Accessed in 5.8.2022.

[9] Caldecott, Ben. Introduction: Stranded Assets and the Environment, in: Ben Caldecott (ed.), Stranded Assets and the Environment. Risk, Resilience and Opportunity. Routledge. 2020. Page 1 and 5, also for definitions of stranded assets by, among others, the International Energy Agency and the Carbon Tracker Initiative.

[10] For countering views on the existence of the phenomenon, see. Butler, Nick. "Climate Change and the Myth of Stranded Assets", The Financial Times, 27 September 2015

[11] Helm, Dieter. Stranded Assets – a Deceptively Simple and Flawed Idea", Energy Futures Network 2015, 15

[12] Royal Dutch Shell PLC, Letter to Shareholders – Stranded Assets, 2014, http://s02.static-shell.com/content/dam/shell-new/local/corporate/cor porate/downloads/pdf/investor/presentations/2014/sri-web-response-climate-changemay14.pdf, last accessed 16.8.2022. Indeed, a recent study conducted among institutional investors shows that the average respondents believe that "the equity valuations of the sectors a priori most exposed to climate risk do not fully reflect this risk","valuations are somewhat too high" with mispricing "largest among oil firms, traditional car manufacturers, and electric utilities".

[13] Krueger, Philipp. Sautner, Zacharias. Starks, Laura T. The Importance of Climate Risks for Institutional Investors. Swiss Finance Institute Research Paper Series. N. 18–58. 2019. Page 13.

I am interested in studying the possibilities to place responsibility of these ill-guided investments somewhere but the taxpayers, the citizens, the people, like was done through the German government in the fresh Uniper case.

My initial inspiration to study this question was inspired by Uniper and its investment dispute with the Netherlands, not the currently actualizing geopolitical risk of relying on Russian gas for energy supply. Before the Russian attack to Ukraine, Uniper challenged the Dutch government for banning coal as an energy source. It demanded near 1 billion euros in compensation for a loss of future earnings for the investments it had made in coal plants in the Netherlands. Uniper made these claims using the international investment protection agreement Energy Charter Treaty (ECT) dispute settlement clause, as both the Netherlands and Germany are parties to the treaty.[14] I wanted to make the argument that it has been clear for a while, that fossil investments do not enjoy legal protection within the EU due to a number of reasons, and that Uniper has no grounds to be compensated for its investments in coal in the Netherlands. The dilemma is the same in both Uniper related disputes: who pays the bill when political risks actualize, be it contracts with war-mongering Russia or risk-investment in coal?

This specific dispute is not relevant anymore, as one condition the German government had to save Uniper from bankruptcy was that it has to give up the investment dispute with the Netherlands. This, in my interpretation, is a strong indication of a strong European green energy transition agenda, and secondly, of the Commission's desire to get rid of the ECT altogether. These will be discussed in sections 2.3 and 3. However, the value of the fossil infrastructure protected by the ECT is 344.6 billion euros.[15] That sum is high enough to considerably slow down climate efforts within the EU, in which the global community is desperately late to begin with.

As the world moves away from fossil fuels in order to save the climate, this decade will see cases like Uniper V. Netherlands piling up. Who should pay for

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[14] Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 ("ECT").

[15] https://www.investigate-europe.eu/en/2021/ect-data/ Accessed in 16.8.2022.

these sinking investments legally speaking? This thesis attempts to offer one line of argumentation for the discussion.

1.Introduction

1.1 Context: climate litigation

The IPCC "Global Warming of 1.5 °C" report shows that a global temperature rise of 1.5 °C in comparison with pre-industrial levels will fundamentally change the living conditions of this planet.[16] The fundamental question is, will the human species survive this and the coming century, and how? In addition to being an existential question for the human kind, the ecocrisis including global warming is a legal question. State and international organization climate action is carried out in legal instruments, and in addition, a whole literature and case law exists in climate litigation. This thesis finds it broad context within climate litigation literature, and the introductory sections will begin with a brief contextualization of climate litigation.

Three waves of climate litigation have been identified in literature.[17] The first wave consists of pre-2007 cases primarily in the U.S. and Australia brought against the government bodies as administrative claims to raise environmental standards. The second wave brought climate litigation to Europe, used as strategic tool in absence of effective international action between 2007-2015. The third wave of cases 2015 onwards has seen the diversification and expansion of types of argumentation, volume of cases, type of defendants and number of jurisdictions in which cases are being processed.[18]

The cumulative number of climate cases has more than doubled since 2015 globally, as of May 2015, according to a compiling empirical analysis used here.[19] A little more than 800 cases were recorded from 1986 to 2014, and over 1000 cases have been filed between 2015 and 2021.[20] The majority of all cases have

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[16] IPCC 2018.

[17] Benjamin, Lisa. The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties. ULR 313. 2020. DOI:10.26054/0d-e2h0-xr0j. Page 317.

[18] Golnaraghi M, Setzer J, Brook N, Lawrence W and Williams L. Climate Change Litigation – Insights into the evolving global landscape. Geneva Association. 2021.

[19] Setzer Joanna and Higham Catherine. Global trends in climate change litigation: 2021 snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science. 2021.

[20] Setzer et al 2021. Page 3.

been filed in the United States (1,387 out of the total of 1,841). The remaining 454 cases are divided in 39 other countries and international or regional jurisdictions like the courts of the European Union. Cases are filed by large majority in the Global North, but Global South cases are on the rise with 58 cases in 18 different jurisdictions. Strategic litigation is being used as an activist strategy is gaining popularity, as is targeting corporations instead of governments. Of the decided cases reviewed in the Climate Change Laws of the World database, 58% were favorable to climate action, 32% unfavorable and 10% had no detected impact on climate policies.[21]

Trends in strategies utilized nowadays are analyzed and listed by Setzer et al.[22] These include, firstly, compliance with climate commitments including challenging direct acts or omissions of governments, including *Urgenda* type cases.[23] After the completion of the Paris Agreement, the amount of cases targeted at enforcing it became to rise.[24] Also government authorization of third party action is challenged. Common grounds of argument are in constitutional, administrative and human right law. Secondly, a group of cases is wholly built on human rights law, as global warming has been recognized as the "greatest human rights issue of our time".[25] These cases are usually brought against governments, but also companies. Thirdly, cases focused on adaptation are brought to courts mostly in the U.S. and Australia. Claims concern principles and standards of adaptation in planning and environmental impact assessments.[26]

Fourthly, strategies utilized in the corporate and financial markets are on the rise. A group of these case focus on establishing liability and compensation.[27] A rising number of cases aim at establishing financial risk, fiduciary duty and corporate

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[21] Setzer et al 2021. Page 5.
[22] Setzer et al 2021. Page 6.
[23] HR 20 December 2019, 41 NJ 2020, m.nt. J.S. (Urgenda/Netherlands)
[24] Carnwath R. Climate Change Adjudication after Paris: A Reflection. Journal of Environmental Law 28(1). 2016. Pages 5-9.
[25] Mary Robinson, Former UN High Commissioner for Human Rights (see Office of the High Commissioner for Human Rights, 2015).
[26] Setzer et al 2021. Page 17.
[27] Setzer, Joanna. (forthcoming) Impacts of high-profile litigation against major fossil fuel companies. In César Rodríguez-Garavito (ed). Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action. Cambridge University Press.

due diligence liability. These cases are targeted against fossil fuel and other emission heavy corporations, banks, asset managers, insurance companies and pension funds and financial government institutions, inter alia. Common claims include challenges of deliberate disinformation, failure of disclosure[28] and management of climate risk [29], challenges of specific projects[30], and corporate duty of care in relation to human rights and climate mitigation targets mirrored against major emitters activities in short, medium and long term. Cases vary from investor-led challenges to investment decisions to claims to enforce disclosure of climate risks.

It is in the context of the last group of litigation strategies where this thesis finds its place. More precisely, the argumentation is familiar from cases where climate is viewed as a financial risk, and the failure to properly assess and disclose its impact on shareholders and investors.[31] This type of litigation has been rare, but from 2018 onwards, a significant growth in the amount of cases has been detected.[32] Claims made include allegations on directors and fiduciaries failing to adapt investment strategies according to the scientific and publicly available information on anticipated climate mitigation laws and policies, specifically the financing of long-term carbon-intensive assets.[33] [34]

1.2 Risk discourse as the conceptual approach

Because of the way the human population is organized politically and economically, I have chosen to approach the possible human extinction, tragically but pragmatically, from an economic point of view in this thesis. Also the 21st Conference of Parties (COP) to the United Nations Framework

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[28] Solana, Javier. Climate Litigation in Financial Markets: A Typology. Transnational Environmental Law. Volume 9 Issue 1. 2019. Pages 1-33.

[29] Solana, Javier. Climate change litigation as financial risk. Green Finance, 2(4). 2020. Pages 344-372.

[30] See for example Bouwer K and Setzer J (2020) New trends in Climate Litigation: What works? British Academy COP26 Briefings Series. www.thebritishacademy.ac.uk/documents/2701/Climate-Litigation-as-ClimateActivism-What-Works.pdf. on the questionable efficiency of these kind of strategies.

[31] Solana. 2019. Page x.

[32] Solana. 2019. Page 1.

[33] Setzer et al. 2021. Page 29.

[34] See for example McVeigh v. Retail Employees Superannuation Trust. NSD1333/2018.

Convention on Climate Change (UNFCCC)[35], held in Paris in December 2015, concluding product being the Paris Agreement, the bedrock of all ongoing international, regional and much of local climate work, discusses the costs of extreme weather, and the negative impact of global warming on economic growth in the Southern Hemisphere. The Paris Agreement's first goal of limiting the global temperature rise to 1.5 °C, stated in Article 2.1 (a), necessitates achieving the second and third goals in the Article 2.1 (b-c): the financial system and the economy must become resilient to climate-related physical, market, regulative and liability risks; and to reach these goals, the flow of finance must be "consistent with a pathway towards low greenhouse gas emissions".[36] However, the Tragedy of the Horizon as defined by Carney, is to be solved before the transition can be accomplished before it is too late.[37] The Tragedy is created by increasingly short-term oriented financial market, whose horizon is too close to allow for climate action: the cost of global warming is imposed on future generations without incentive for the current one to avoid or shrink it, discounting the future costs in an outrageously risky manner.[38]

Already from the late 1980s on, the concept of "carbon budget" has existed, and so has the idea of a "carbon bubble", that was explicitly defined in 1989. If the amount of fossil fuels burned adding a certain amount of carbon to the atmosphere would exceed the budget, either the climate or the value of the fossil reserves has to be given up. Hence, the term "unburnable carbon" that the Carbon Tracker Initiative coined in 2011.[39] The European Commission has also used the terms of carbon bubble and unburnable carbon.[40] As Bruno notes, from an investor point of view, the Paris Agreement itself has made the risks of investing in fossils more

[35] United Nations Framework Convention on Climate Change. New York: United Nations, General Assembly.1992.
[36] U.N. Framework Convention on Climate Change, Adoption of the Paris Agreement, U.N. Doc. FCCC/CP/2015/L.9 (December 12, 2015)
[37] Carney, M. "Breaking the Tragedy of the Horizon – climate change and financial stability", Speech by Mr Mark Carney, Governor of the Bank of England and Chairman of the Financial Stability Board, at Lloyd's of London, London, 29 September 2015, BIS, London, England. Available at:
https://www.bis.org/review/r151009a.pdf. Accessed 22.8.2022.
[38] Benjamin. Page 350.
[39] Calcedott. Page 6.
[40] Committee on Economic and Monetary Affairs of the European Parliament Draft Report, 2 February 2018.

concrete than ever before: not only have 196 nations committed to meeting certain climate goals, but also the Paris Agreement signals the rising probability of new environmental regulation to meet those goals.[41]

For example, the G20 Financial Stability Board's Task Force on Climate-related Financial Disclosures published Recommendations in 2017 to encourage financial institutions to publish consistent, comparable and clear information on climate-related risks for correct valuing of assets. The effects are not a long-term issue: the rapid reallocation of capital from fossils into clean energy technologies is likely a short-term phenomenon.[42] In addition to the physical impacts of a heating climate, the economic risks include the transition to a low-carbon economic system. This means extensive reorganization of policy, law, technology and market in addition to the reputational risks with operating within the fossil industry.[43] On the other hand, climate action requires around 1 trillion dollars of investment per year for the foreseeable future, according to the Recommendations.

For risk and opportunity management, the Recommendations guide companies to disclose government, strategy, risk management and metrics and targets to assess and manage risks. These include explicating how the board is organized in relation to oversight and management; scenario work in short, medium and long term assuming also a scenario of 2 °C or lower future; and the risk management procedures and processes.[44] This guidance is reflected in law discussed in sections 4.2, 4.3 and 4.5. The failure to manage the risks in the ways described above forms the paradox: it is impossible for an energy company, I argue, to manage the climate risks in any other way but to divest from fossil fuels. These kind of arguments used in climate litigation take the reality and physical consequences of a heating planet as the starting point of legally arguing for green transition.

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[41] Bruno, Sabrina. Climate Corporate Governance: Europe vs. USA? European Company and Financial Law Review 16(6):687-723. 2019. DOI:10.1515/ecfr-2019-0027. Page 688.
[42] Task Force on Climate –Related Financial Disclosures ("TCFD"), Recommendations of the Task Force on Climate-related Financial Disclosures. Final Report. June 2017. Page ii. https://www.fsb-tcfd.org/publications/.
[43] TCFD. Page 5.
[44] TCFD. Page 13.

Besides the financial risks and opportunities – around 1 trillion dollars at risk and 2.1 trillion dollars in opportunities according to some estimates[45] – there is also a growing litigation risk.[46] According to the Intergovernmental Panel on Climate Change (IPCC), the United Nations (UN) body for assessing the science related to climate change, 2.4 trillion USD needs to be invested in clean energy globally and yearly from 2016 to 2035 to achieve the 1.5 °C target.[47] The European Union needs a yearly investment of 180 billion EUR to achieve its 2030 climate targets.[48] As a result, investors and shareholders are increasingly challenging company leadership for failing to factor climate risks into their business decisions.[49] From a climate litigation point of view, this is good news for the litigants, as shareholders and investors are more experienced and well-resourced, unlike activists, NGOs and children as litigants often are.[50] From another angle, an accusation can be made that since there is business opportunity in de-carbonization for even the Carbon-Majors[51] [52] [53], it is bad leadership not to grab on to those.[54]

[45] Carbon disclosure project ("CDP"), Climate Change Report, Major Risk or Rosy Opportunity. Are Companies Ready for Climate Change? 2019. Page 4. https://www.cdp.net/en/research/global-reports/global-climate-change-report-2018/climate-reportrisks-and-opportunities. Accessed 22.8.2022.
[46] Setzer et al 2021. Page 30.
[47] IPCC, 'Global Warming of 1.5°C: Summary for Policy Makers', Oct. 2018, Paragraph. D.5.3. Available at: https://www.ipcc.ch/sr15.
[48] Communication from the European Commission, 'Action Plan: Financing Sustainable Growth', 8 Mar. 2018, COM(2018)97 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097 (EC Sustainable Finance Action Plan). Page 2.
[49] Setzer, Joanna. Byrnes, Rebecca. Global Trends in Climate Change Litigation: 2019 Snapshot. Policy Report. July 2019. http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf
[50] Benjamin. Page 352.
[51] Carbon-Majors is a term used for a group of companies that are responsible for over 30% of global industrial greenhouse gas (GHG) emissions that produce oil, natural gas, coal and cement. Benjamin, Lisa. The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough? Transnational Environmental Law, 5(2), 353-378. 2016. DOI:10.1017/S2047102516000194. Page 353.
[52] Goldman Sachs, Re-imagining big oils how energy companies can successfully adapt to climate change. 2018. https://www.goldmansachs.com/insights/pages/reports/re-imagining-big-oils-f/reimagining-big-oils-report-pdf.pdf [https://perma.cc/GX4L-FN4W]
[53] Heede, Richard. Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010. 122(1) Climatic Change, 229–241. 2014. Page 229.
[54] Benjamin. 2020. Page 351.

The World Economic Forum in its Global Risk Report 2018 put extreme weather, natural disasters and the failure of climate action among its top 5 risk categories.[55] It is clear that early, consistent policy would be the least-damaging alternative in managing these risks, and allow for a smooth transition for a sustainable economic system.[56] Once the impact of global warming is felt so that it forms a tangible incentive to act, it is too late to achieve the 1.5 or even 2 °C goals.[57] Unsurprisingly, accounting for and assessing of climate risk has been noted to be a key blind spot for large companies. In a quantitative research, Goldstein looked into 1,630 big corporations' voluntary climate reporting to shareholders. The risk was not adequately characterized, and no adequate preparing was disclosed.[58]

For these reasons, I approach the climate problem via the concept of risk. I ask: who should bear the cost of gambling with making profits with climate averse business in the 2020s, the last possible decade of effective climate action with the 1.5 and 2 °C goals in mind. The current economic and financial system does include elements incentivizing climate action in investment as well. Yet we still see record high investment in fossil energy that should be phased down in the coming decades, and the sooner, the better. These actors are gambling, I argue, not only with the future of the planet, but also with the money of the investors.[59]

My second motivation to choose the risk perspective is to help overcome the perceived contradiction between climate action and corporate law. There is, for example, a much cited contradiction in Finland's state carbon neutrality by 2035 law and EU climate law, and silence as a shareholder in its state-owned company

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[55] Global Risk Report. World Economic Forum. 2018.
[56] Gianfrate, G. "Designing Carbon-Neutral Investment Portfolios", in Walker, T., Kibsey, S. and Crichton, P. (Eds.), Designing a sustainable financial system: Development Goals and Socio Ecological Responsibility. Springer Nature. Cham. Switzerland. 2018. DOI.org/doi.org/10.1007/978-3-319-66387-6. Pages 151–172.
[57] Carney, M. "Resolving the climate Paradox." Text of the Arthur Burns Memorial Lecture by Mr Mark Carney, Governor of the Bank of England and Chairman of the Financial Stability Board, Berlin,
22 September 2016, BIS, Berlin, Germany. Available at: https://www.bis.org/review/r160926h.pdf. Page 7.
[58] Goldstein, Allie et al., The Private Sector's Climate Change Risk and Adaptation Blind Spots, 9 Nature Climate Change 18, 18. 2018.
[59] Schoenmaker, Dirk; van Tilburg, Ren. Financial risks and opportunities in the time of climate change. Bruegel. 2016. https://www.bruegel.org/policy-brief/financial-risks-and-opportunities-time-climate-change Accessed 10.8.2022. Page 8.

Fortum's subsidiary Uniper's plans to challenge another state's climate policy as described in the Foreword .[60] Indeed, under Finnish and German company law, Uniper and Fortum directors and the Finnish state *not* seeking compensation for their stranded assets, could lead to their liability.[61] This is due to a corporate law maxim: the company directorship has to advance the best of the company in order to increase the value of the shareholder investment. Not using all legal means to minimize losses would then be against the interest of the company. I use the same maxim from another perspective: in the light of the best available knowledge, no other energy sector business can fulfill the duty to advance the interest of the company in long enough term, but that of stopping investing in fossils, in Europe.

1.3 Research questions and methodology

Phasing out fossil energy is at the heart of any reasonable attempt to halt global warming. In international law, the starting point would then be international environmental law. Substantively, not much of international environmental law will be discussed in this thesis, but it is present through the context of climate litigation. At the same time, international energy investments fall under the scope of international investment law, and the investment protection provided by investment agreements, including multilateral treaties like the ECT.[62] [63] Therefore, the context of international investment protection and the overview of the ECT will be discussed. As the EU has its own investment protection legal discussion going on, the issue falls under the scope of EU law as well.[64] Relevant EU law will be discussed, as I attempt to make my argument about fossils outlawing only within the EU. As the approach chosen to the fossil energy phase out is that of an energy company, the scope would also entail company law.[65]

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[60] Finland puts new climate target top of EU leadership agenda (climatechangenews.com) Accessed 9.8.2022.
[61] https://www.ejiltalk.org/risky-business-unipers-potential-investor-state-dispute-against-the-dutch-coal-ban/ Accessed 9.8.2022.
[62] Energy Charter Treaty 2080 UNTS 100, 10 ICSID Rev—Foreign Investment L J 258.
[63] Dolzer, R. Schreuer, C. Principles of International Investment Law. 2nd ed. Oxford University Press. 2012. Pages 13–17.
[64] Särkänne, Katariina. Mapping Environmental Regulatory Measures Affecting Investments Under the EU's Changing Framework of International Investment Law - The Case of Shale Gas. OGEL 1. 2019. Page 2.
[65] Kraakman, Reinier H. The Anatomy of Corporate Law: A Comparative and Functional Approach. Oxford: Oxford University Press. Print. 2009. Pages 5-14.

Developing the argument by showing how within the EU, the much used ECT dispute settlement mechanism is no longer applicable, I will finally discuss the dynamic meaning of the company law concept fiduciary duty. What does it mean to fulfil the duties of care, loyalty and oversight as a company director when an investment decision on fossils is on the table?

Researching company law led me to a detour to international business literature. I need this literature to show how big companies manage political risk. If companies use dispute settlement as a risk management tool and that is now off the table within the EU, that has an effect on the directors' duties as well. Political risk here is climate action, as it represents change in the regulative environment e.g. in the form of coal bans and emission cut policies. I found using empirical research on corporate decision making useful and enriching in addition to more traditional legal sources, including engaging in discussion with existing literature and making observations directly based on first hand sources.

At the heart of the global energy transition; at the heart of my thesis' argument; and at the heart of company law is responsibility allocation. It is, in a way, a discussion about *who should have known.* In the energy transition, the question is *who should have known fossil investments will become stranded assets, and since when this was true.* I attempt to show that *directors of the Carbon-Majors should have known, and that they have known, that fossil investments will become stranded assets, and that they themselves have chosen to make these high risk investments.* In company law this question of who should have known is dealt with within the concept of fiduciary duty, and takes the language of due diligence.

It is in the realm of intra-company risk management allocation where I place my argument: directors, those, who make business decisions are responsible to act in good faith and fulfil their fiduciary duties in spending the shareholder money. Due to the evident phase out of fossil fuels due to Paris Agreement obligations, and the recent ban on using an important political risk mitigation tool in the energy sector, the ECT's dispute settlement mechanism in intra-EU disputes, I propose directors operating in the EU market cannot have made business decisions including investing in coal, and simultaneously fulfilled their fiduciary duties of care,

loyalty and oversight in good faith. The exact point in time when this became impossible is not possible to determine, but possible points include the signing of the Paris Agreement; the *Achmea* decision in 2018 or the *Komstroy* decision in 2021.

In principle, answering my research questions ergo making my argument requires assessing two issues: the significance of mitigating climate risk in fulfilling the fiduciary duty and the significance of investment arbitration in mitigating company political risk.

To accomplish this, the role of international investment arbitration in relation to energy sector; the recent ban of using investor-state dispute settlement in intra-EU disputes; fiduciary duty in its traditional and dynamic meaning; and company risk management strategies are discussed. These assessments together will allow to conclude 1) what is the significance of the ECT arbitration clause being removed to the energy business decision making in risk management within the EU, and 2) what is the overall assessment of the possibilities to invest in fossils while fulfilling the fiduciary duties in EU at the moment.

The double commitment to efficient climate action and to the current investment protection regime within the EU will create a new wave of "phase out cases" under the ECT, predict Eckes and Ankersmit.[66] This argues for the relevance of my thesis research question choice, added to the more novel company law approach through which I take part in the discussion of investment arbitration and regulatory chill.[67] It is not within the scope of this thesis to discuss the effects of possible renewal and update process of the ECT.

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[66] Eckes, Christina, Ankersmit, Laurens. The compatibility of the Energy Charter Treaty with EU law. Report. University of Amsterdam. 2022.

[67] In addition to other literature, multiple master's thesis from the University of Helsinki Law Faculty have been submitted around the ECT. See for example Sorvaniemi, Saara. Jurisdiction of an arbitral tribunal in an intra-EU investor-state dispute settlement under the Energy Charter Treaty, 2020; Heinäsmäki, Aapo. The Environmental Aspects of the Energy Charter Treaty and their Significance in Litigation, 2020; Hokkanen, Aleksi. The Energy Charter Treaty and Decarbonization of Foreign Investments : Is the Investor Arbitration Warming the World by Chilling the Regulatory Environment, 2021; Back, Joel. The Suitability of the Doctrine of Legitimate Expectations in International Investment Law: Energy Transition Perspective, 2021.

Using company law in my argumentation has advantages and disadvantages. Firstly, due to the global nature of the current economic system, company law is remarkably similar in all major jurisdictions.[68] This will help mitigate the inaccuracies that are inevitable when looking into how a legal framework regulated on the national level functions together with international law and EU law, and help draw conclusions that apply on the general level. Secondly, it is a novel take on the specific, quite newly emerged situation in the EU. It allows the responsibility discussion to take an intra-company form, instead of having to discuss, who in the fabric of society is responsible for climate inaction and climate damage. It will add a new argument to the debate against fossils that doesn't presuppose the overthrow of the current polito-economic system but builds on the assumption that there is a business case for climate action. At least, there is a business case to not invest more in fossils.

This is the first shortcoming of the approach, as well. There is no guarantee that building on the current polito-economic system will yield a sustainable society even if emissions were successfully cut. This is due to the ever-expanding nature of capitalism.[69] Secondly, the logic of company law is predominantly economic.[70] Homo economicus as the expected behavioural principle - everyone maximizing their own gain in an atomistic manner - produces a setting in which the worst is expected from all parties involved in a company. The directors are expected to behave opportunistically, and an asymmetry of information between the directors and agents is assumed to create opportunism. Fiduciary duties are a legal way to respond to this setting.[71] Along writing this thesis, it has become clear that this strong predisposition makes company law its own realm with linkages to economics more broadly. It is difficult to assess, how well that language and logic function, when combined with international law and EU law. On the other hand, these worlds collide in reality as well, and it is lawyers' job to make sense out of the whole.

[68] Kraakman et al. Page 1.
[69] Raworth, Kate: Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist. Random House Business Books. London. 2018.
[70] Kraakman et al. Page v.
[71] Mähönen, Jukka and Villa, Seppo. Osakeyhtiö I: Yleiset opit. Helsinki. 2006. Page 370.

Thirdly, there is a vivid discussion about the purpose of company law. In an abstract sense, many scholars would argue that the purpose is to advance aggregate welfare in the society. More concretely, this is done through increasing shareholder value.[72] Personally, I do not accept this premise due to environmental and social concerns. To some extent, building a normatively motivated argument for climate action on such basis seems like a weak starting point. However, I have chosen the pragmatic approach.

The challenge in this thesis is to build the argument piercing the legal regimes of company law, EU law, international investment law and international environmental law. There is no attempt to discuss any of these regimes in depth, but rather convince the reader, that the overall assessment of the material world situation, and the recent developments in the specific questions of law reviewed here, leads to the conclusions that are drawn. A shortcoming of the chosen approach, however, is the lack of deeper analysis of any of the discussed regimes.

As mentioned, I have a normative motivation to deliver my argument. I have a strong stance, which is pro climate action. This might also show itself as bias, although I strive for accuracy and honest assessment of the current legal reality in my argumentation in despite of the normative level engagement. In addition, the section on the history of international investment law is included to give content to the critical approach premise relevant to this thesis. International law is a product of a political struggle over property and wealth, and so is the climate struggle in many ways. The Carbon-Majors are the world's richest private entities.

2. The context of International Investment Law

The approach towards international law on the theoretical level in this thesis is that of the critical school. More particularly, the premises of any analysis on

[72] Kraakman et al. Pages 18-19.

international law in this thesis are aligned with writers like Martti Koskenniemi[73], Anthony Anghie[74] and Doreen Lustig.[75] They all have their formulation of the same analysis of international law: it is a product of the historical and current world system of capitalism. This means that the injustices in international law are not mistakes and omissions, but codified language of the powerful.[76] Symptomatically, the most fundamental concepts of public international law such as sovereignty, has been born in the writings of Fransisco de Vitoria, pondering on the justification of acquiring and protecting particular property: that of the conquistadores of Spain and Portugal in relation to the peoples of America.[77] [78] Later on, the difference between law and politics has been questioned, with merit.[79] For the purposes of this thesis, it is useful to cast a similar critical gaze on international investment law as part of the same project of acquiring and protecting particular properties. This introduction will help justify, in its part, the pragmatic-opportunist use of international investment law in this thesis as historically, international law more generally, and international investment law particularly has developed according to what the needs of the global property-owners have been.[80]

Secondly, this introduction will set the ECT in its historical and political context. Against this background, I hope it is easier for me to show later on that the current, political dispute between the EU legal system and the ECT and investment law regime is a section in a history of conflict of political projects.

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[73] Koskenniemi, Martti.The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960 (Hersch Lauterpacht Memorial Lectures, pages 11-97). Cambridge University Press. 2001. DOI:10.1017/CBO9780511494222.003

[74] Anghie, Anthony. Imperialism, Sovereignty and the Making of International Law (Cambridge Studies in International and Comparative Law). Cambridge University Press. 2005. DOI:10.1017/CBO9780511614262

[75] Lustig, Doreen. Veiled Power: International Law and the Private Corporation, 1886–1981. Oxford University Press. 2020. Page 2. See also Morris Cohen's 1927 article Property and Sovereignty. 13 Cornell L. Rev. 8. 1927.

[76] Anghie.

[77] Vitoria, F. Pagden, A. & Lawrance, J. (Eds.), *Vitoria: Political Writings* (Cambridge Texts in the History of Political Thought, p. Vii). Cambridge: Cambridge University Press. 1991. Pages 245-6.

[78] Koskenniemi. 2001. Section 1.

[79] See for example Morgenthau, Hans. Positivism, Functionalism and International Law. 34 Am. J. Int'l L. 260. 1940. Page 261.

[80] Lustig. Page 5.

Similarly, there is a perceived political conflict between states' climate action obligations and Carbon-Majors' right to short and medium term profit.

2.1 A short genealogy of international investment law

The birth of international investment law is connected to the historical moment then at hand. Former colonies were gaining independence during the 1960s and 1970s, and international relations were being negotiated anew. The relevant context of law between the colonizer and colonized states shifted from property law between imperial governments' sovereignty and decolonized nations' property, to contract law between investors and decolonized nations, like Hartley Shawcross concluded in his famous lecture in 1961.[81]

Traditionally, the only subjects of international law possessing legal personality had been states. Therefore, the protection of foreign investors' rights was done through state action as diplomatic protection. As described by the Permanent Court of International Justice, a state was asserting its own rights through protecting its subjects' rights, and the respect of rules of international law.[82] Those years saw the rise of Multi-National Corporations (MNCs) to the centre of the world economy, and consequently, to the heart of interest of academia.[83] [84] [85] [86] During the same decades the former colonial countries had their historical moment of trying to push for a New International Economic Order (NIEO) through the United Nations institutions. This included challenging the existing balance between capital-exporting and capital-importing countries' rights. The debates included the Calvo Doctrine pushed by Latin American states among other capital-importers that limited the use of diplomatic protection[87], and a

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[81] Lord Shawcross, The Problems of Foreign Investment in International Law, 102 Collected Courses of the Hague Academy of International Law 339. 1961. Page 355.
[82] Mavrommatis Palestine Concessions (Greece v United Kingdom) (Judgement on the Objection to the Jurisdiction of the Court, 30 August 1924) PCIJ Rep Series A No 2, 12.
[83] Hymer, Stephen. Life and the Political Economy of Multinational Corporate Capital. 21 Contributions to Pol. Econ. 9. 2002.
[84] Hymer, Stephen. The Multinational Corporation and the Law of Uneven Development. New Haven, Conn. 1975.
[85] Sunkel, Osvaldo. Big Business and 'Dependencia', 50 Foreign Aff. 517. 1972. Pages 517–18.
[86] Alexandrowicz, Charles H. The Afro-Asian World and the Law of Nations (Historical Aspects), 123 Recueil des Cours 117, 172–210. 1968.
[87] Dolzer and Schreuer. Page 2.

competing Hull formula from the United States, advocating for "prompt, adequate and effective compensation" in case of expropriation.[88] The United Nations General Assembly 1962 Resolution on the Permanent sovereignty over natural resources rejected both doctrines.[89]

The debate took place in the auspices of the International Court of Justice (ICJ) as well. The landmark case of the ICJ, Barcelona Traction, narrowed the diplomatic protection that shareholders could receive under the doctrine of customary international law.[90] The crux of the issues before the ICJ in Barcelona Traction was, whether Belgium, that was the home state of the majority of shareholders, had ius standi before the court. Belgium relied on diplomatic protection, but the ICJ ruled that the right to diplomatic protection belonged to the state in which the company had its registered office, and under whose laws its operated, and not to the state of shareholders.[91] The ability of a state to protect the interests of its investors before the ICJ was therefore limited. In another, earlier landmark case, the Anglo-Iranian Oil Company, the ICJ reached a similar verdict.[92] The ICJ used the corporate law principle of separation of ownership (shareholder) and control (company directorship) in both cases. The British state as a shareholder, or the Belgian citizens as shareholders, were not given similar rights as states in relation to the state hosting the investment.[93]

Through analysing the political repercussions of these two landmark cases of Anglo-Iranian Oil Company (AIOC) and the Barcelona Traction, Lustig shows how international investment law was born to protect the capital owner. This was quite openly communicated by the American Judge Philipp Jessup[94] and in the separate opinion of the Japanese Judge Kōtarō Tanaka.[95]

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[88] Dolzer and Schreuer. Page 3.
[89] UNGA Res 3281 (XXIX) (12 December 1974) 'Charter of Economic Rights and Duties of States' <https://legal.un.org/avl/pdf/ha/cerds/cerds_ph_e.pdf> accessed 12.8.2022. Article 2(2)(c).
[90] Lustig. Page 12.
[91] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgement, 1970 I.C.J. 3, 43 (February 5). Paragraph 43.
[92] Anglo-Iranian Oil Co., U.K. v. Iran, Order, 1951 I.C.J. 106 (Aug. 22).
[93] Lustig. Page 182.
[94] Barcelona Traction Case. Separate opinion of Judge Jessup. At 196, 59. Restatement (Second), Foreign Relations of the United States, § 173. 1965. Paragraph 168.
[95] Barcelona Traction Case. Separate opinion of Judge Tanaka.

Judge Jessup argued for a realistic, non-formalist interpretation based on the "economic reality of the relevant transactions".[96] He argued for realizing and confirming the importance of foreign interests as relevant state interests.[97] Judge Tanaka argued that some form of investment protection was necessary: if shareholders would be left in a helpless condition, that would harm the development of international investment.[98] Both Japan and the US were at the time increasing their foreign investment heavily, and are still major examples of capital-exporting countries.[99]

As the ICJ did not side with the capital-exporting countries camp strongly enough, investors and their states decided they needed another mechanism to protect their interests. Investment arbitration and investment treaties started gaining traction and significance.[100] Because the investing companies were virtually without exception from states of Global North, and the states being invested to were of Global South, that was the dynamic of the first wave of bilateral investment treaties (BITs). As a result, the ICJ and the United Nations premises lost importance as the regulatory context in investment.[101] Capital-exporting countries had to flee from the "tyranny of the majority"[102] and come up with their own system of capital protection.

The new system did include a new way to protect capital. A new forum of dispute settlement separate from the ICJ was born: the arbitral tribunals.[103] The International Centre for Settlement of Investment Disputes (ICSID) was founded in 1965.[104] In addition to the United States and Japan, Germany started investing heavily as well.[105] International investment law as its own separate legal regime

[96] Barcelona Traction Case. Restatement (Second), Foreign Relations of the United States, § 173. 1965. Paragraphs 114 and 130.
[97] Barcelona Traction Case. Separate opinion of Judge Jessup. At 196, 59.
[98] Barcelona Traction Case. At 114, 130. Separate opinion of Judge Tanaka.
[99] Lustig. Page 204.
[100] Lustig. Page 172.
[101] Lustig. Page 183.
[102] Lustig. Page 214.
[103] Lustig. Page 192.
[104] Lustig. Page 193.
[105] Lustig. Page 194.

was born in response to the existing public international law's development into a direction not favourable to the property-owners of the globe, ergo the former imperial governments, newly investors.[106] The amount of foreign investment was growing quickly.

More importantly, the terms of the whole international investment regime were set in these new BITs. The terms of the agreements were dictated by the investing companies, and therefore, the whole regime was and is focused on protecting investor interest.[107] The ICSID drafted a model Convention based on the OECD's Draft Convention on the Protection of Foreign Property that became the standard model of the conclusion of a BIT. The first signatories were from Global North, Asia or Africa to a large extent, although post-colonial countries were resisting the rules of the ICSID Convention. This was because they were considered unfair from the point of view of the investment receiving country.[108] Hungary was the first Eastern Bloc state to join the ICSID IN 1986. When the Cold War ended, the ICSID saw a wave of former Eastern Bloc countries joining.[109]

As Lustig notes, during the process of the regime of international investment law stabilizing its primacy and gaining traction as the standard way of thinking about capital exporting and importing between the West and the rest, corporations became equal rights-bearers and litigants in international law. They also gained a position in which they could regulate the rules governing their own behaviour especially in the context of environmental responsibilities and human rights. What did not happen was that the corporations would also have become subjects of international responsibility.[110] Their relative position was significantly enhanced in comparison to states.

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[106] Lustig. Page 5.
[107] Lustig. Page 13.
[108] The ICSID Convention entered into force on October 14, 1966: Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.
[109] The World Bank Group, ICSID: List of Contracting States and Other Signatories of the Convention. Online: ttps://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf. Accessed 25.8.2022.
[110] Lustig. Page 218.

2.2 International Investment Law and climate efforts

International investment law has developed since. Nowadays, it is reasonable to state there has for long been attempt to find a balance between investor protection that enable valuable long-term investments, and the host state's right to regulate in response to the constant change of circumstances any society is exposed to.[111] [112] Over the last decade, investment arbitration tribunals have, perhaps unexpectedly, become the "last frontier"[113] for climate-related disputes.[114] [115] [116]
New developments include using investment arbitration to oppose policy changes to the detriment of both climate[117], and climate change mitigation policies.[118] [119] The argumentation in these case types is beyond the scope of this thesis, but is mentioned here to underline the topicality of the international investment protection regime in the climate action discussion.

Regardless of there not existing a doctrine of binding precedents in international law nowadays, a strong de facto system of precedents and reliance on past jurisprudence has developed over time.[120] [121] As such, the investment protection branch of international law can be viewed as a well-functioning, separate machine for securing private investments, with states and other actors striving to amend

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111 Dolzer and Schreuer. Pages 145-149.
112 Ferrari, Franco and King, Brian. International Investment Arbitration in a Nutshell. St. Paul, Minn. West Academic Publishing. 2020. Page 559.
113 Dias Simões, Fernando. Blusun S.A. and others v Italy: Legal (in)stability and renewable energy investments. Review of European, Comparative & International Environmental Law. Volume 26, Issue 3. 2017. Page 303.
114 Faccio, S. The Italian Energy Reform as a Source of International Investment Disputes. 2 Rivista di Diritto Internazionale Privato e Processuale. 2016. Page 460.
115 Vadi, Valentina. Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals? 48 Vanderbilt Journal of Transnational Law. 2015. Page 1315.
116 Whitsitt E. and Bankes N. The Evolution of International Investment Law and its Application to the Energy Sector. 51:2 Alberta Law Review. 2013. Pages 213-214.
117 Keene, Amelia. International Investment Developments. 28 Yearbook of International Environmental Law 9. 2017. Page 7.
118 Keene. Page 1.
119 Vadi. Page 1318.
120 Schill, Stephan W. International Investment Law and Comparative Public Law – An Introduction' in Schill (ed), International Investment Law and Comparative Public Law. 3. Oxford University Press. 2010. Page 18.
121 For counter argumentation and discussion, see Muchlinski, Peter, Federico Ortino, and Christoph Schreuer (eds), The Oxford Handbook of International Investment Law. 2008. Online edn, Oxford Academic, 18 Sept. 2012. DOI.org/10.1093/oxfordhb/9780199231386.001.0001. Accessed 12 Aug. 2022. Pages 1188-1189.

their current position, trying to correct the tilted balance for example in the quest for modernizing the ECT.[122] [123] [124]

This thesis' argument is not how private companies determine the fate of the rest of us. However, the branch in climate litigation that challenges the Carbon-Majors, takes just that as its starting point and challenges it. The birth story of international investment law is one point in the history of international law, where companies stepped to the light with their demands towards governments instead of operating in the background.[125] Companies use international law to advance their interests. In strategic climate litigation and in this thesis, company law and EU law are used to advance the public interest of halting global warming. The ECT as a multilateral investment agreement will be introduced next.

2.3 Energy Charter Treaty

2.3.1 Background of the Energy Charter Treaty

The Energy Charter Treaty is a unique multilateral treaty in substance. It is limited to the energy sector, and in that sector, it establishes rights and obligations in investment, trade and other matters, and determines the enforcement of these rights and obligations.[126] The ECT, currently, the most widely ratified investment protection protocol. In its reach, it is virtually global.[127] By 2017, the ECT has

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[122] Council of the EU Press release 15 July 2019. https://www.consilium.europa.eu/en/press/press-releases/2019/07/15/council-adopts-negotiation-directives-for-modernisation-of-energy-charter-treaty/

[123] Negotiating Directives for the Modernisation of the Energy Charter Treaty - Adoption, Annex to the Council Decision doc. 10745/19: https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf. Accessed 11.8.2022.

[124] On how these issues could be integrated see, Bernasconi-Osterwalder, N. & Brauch M.D. Redesigning the Energy Charter Treaty to advance the low-carbon transition. TDM. 2019. https://www.iisd.org/publications/redesigning-energy-charter-treaty-advance-low-carbon-transition. Accessed 25.8.2022.

[125] For a more nuanced and detailed account of what developments took place in both corporate personality and investment arbitration before the Barcelona Traction and AIOC cases, see Lustig i.e. pages 185-7.

[126] Bamberger. In Wälde, ed. Page 1.

[127] Roe, Thomas and Happold, Matthew. Settlement of Investment Disputes Under The Energy Charter Treaty. Cambridge University Press. 2011. Page 8.

become the most litigated international investment agreement before the international investment arbitration.[128]

The ECT was drafted in the early 1990s as a result of rising demand in the energy market added with the sudden rupture in the demand of energy in Eastern Europe, and as a solution to the long-term structural problems of energy supply and delivery in the region.[129] Eastern Europe was in dire need of energy investment, and Western Europe saw a possibility to enforce market economy principles via energy sector to the former Eastern Bloc states. The West also saw this as a solution to its own rising demand of energy[130], added to the mutual interest of having Eastern Europe develop into Western direction economically. The goals can be summed up as: "liberalisation of energy markets and protection of foreign investors in the energy sector".[131]

The ECT was preceded by negotiations directed by the European Commission, and with active participation and pressure from the United Kingdom, Germany, Denmark, and the Netherlands. The ECT was given out for signature and ratification in 1994, entering into force in 1998.[132] [133] The Dutch Prime Minister of the time, Ruud Lubbers, commented on the nature of the Treaty: it upheld the basic aims of energy policy by promoting reliable, affordable and clean energy. In addition, Lubbers assessed that the Treaty was a balance stroke between market and regulation, East and West, and producers and consumers.[134] In hindsight, the balance seems way off to the favour of the investor party, and the definition of clean energy has drastically changed, as well. It was not, however so, that the negotiators would have been unaware of global warming. Lubbers himself mentions the "climate problem", and the need to come up with a zero-emission

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[128] UNCTAD 2017:3, cited in Miljenić. Page 53.
[129] Wälde, Thomas W. Edited by. The Energy Charter Treaty: An East-West Gateway for Investment and Trade. London, The Hague, Boston. Kluwer Law International. 1996. Page xiv.
[130] Baltag, Crina. The Energy Charter Treaty: the notion of investor. Kluwer Law International. 2012. Pages 6-7.
[131] Eckes et al. Page 8.
[132] Baltag. Page 8.
[133] Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects [1997] OJ L69/1.
[134] Lubbers. In Wälde, ed. Page xv.

energy supply in his foreword to a book on the ECT in 1995.[135] It does not look like the drafters of the Treaty could anticipate how the jurisprudence on the arbitration clause of the ECT would play out in preventing and slowing down phasing out fossil fuels.

The ECT was, in essence, a treaty to protect western investment made to the eastern parts of Europe, recently having been transformed into liberal market economies after the era of soviet economy.[136] This puts the ECT in canon with the majority of other investment agreements, as discussed above in Section 2.2.[137] Currently, it is used primarily in cases involving EU Member States.[138] It's evolution into the most important intra-EU energy investment agreement is an anomaly against this background, and in the context investment agreements usually being struck between Global North and South.[139] As an instrument historically protecting mostly fossil investments, a contradiction lies in all ECT signatory states also being parties to the Paris Agreement, having agreed to phase down fossil energy on time to reach 1.5 °C heating cap.[140]

2.3.2 Overview

The relevant ECT Articles will be outlined below.

In Article 1(5-6), a definition for "investment" is given. "Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area.[141] "Economic Activity in the Energy Sector" means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials

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[135] Lubbers. In Wälde, ed. Page xvi.
[136] Wälde, ed. Page x.
[137] Global North here referring to Western Europe, and Global South to the Soviet Europe.
[138] Miljenić, Orsat. Energy Charter Treaty – Standards of Investment Protection. Croatian International Relations Review. XXIV (83) 2018. DOI 10.2478/cirr-2018-0014. Page 71.
[139] Eckes et al. Page 58.
[140] https://www.enyolaw.com/posts/211/modernisation-of-the-energy-charter-treaty-boon-or-bust-for-states-seeking-greater-regulatory-latitude-on-energy-policy. Accessed 10.8.2022.
[141] Energy Charter Treaty. Article 1(5-6).

and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.

"Investment", as the Article 1(6) reads, refers to every kind of asset, owned or controlled directly or indirectly by an Investor and includes tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise; claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment; Intellectual Property; Returns; any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.[142]

Read together with the Article 10 that stipulates "Promotion, Protection and Treatment of Investments", the ultra-favourable stance towards foreign investment gets its practical meaning. Article 10 lays down minimum standard of treatment, similar to what can be found in bilateral investment treaty practice.[143] In paragraph 1 of the said Article, the concept of fair and equitable treatment (FET) as a baseline to determine the minimum standard is produced.[144] [145] [146] Each party shall "encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties" in its area. Treatment must be similar in similar circumstances. Investments "shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their managements, maintenance,

[142] Ibid. Article 1(6).
[143] Bamberger. In Wälde, ed. Page 9.
[144] In later jurisprudence of arbitral tribunals, the concept of fair and equitable treatment has gotten its practical meaning. See for example Mamidoil Jetoil Greek Petroleum Products S.A. v. Albania, ICSID Case No. ARB/11/24. Award 30 March 2015. Paragraph 626.
[145] Petrobart Limited v. The Kyrgyz Republic. SCC Case No. 126/2003. Award 29 March 2005. Paragraph 82.
[146] Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24. Award 27 August 2008. Paragraph 164.

use, enjoyment or disposal."[147] It is outside the scope of this thesis to take part in the rich discussion on how FET should be understood nowadays.[148] [149] [150]

In addition to a broad definition of investment and the standards laid down in Article 10, investors are protected against their host states in the enforcement part of the Treaty. Article 26 offers an investment dispute settlement mechanism for investors against states. It has been possible to opt out of these Articles, and several states have chosen to do it.[151] Article 26 provides generous choice for the investor for dispute resolution. Disputes between states and investors must be settled amicably, if possible.[152] There is a three month timeframe for amicable settlement, initiated by either the state or the investor.[153] Failing to resolve the dispute by negotiation within the given timeframe, the investor may submit the dispute to the fora of the host state according to a previously agreed procedure[154], any other applicable, previously agreed dispute settlement procedure[155], or for binding ICSID arbitration founded according to the rules of the United Nations Commission on International Trade Law (UNCITRAL), or a proceeding in the Stockholm Chamber of Commerce in its Arbitration Institute.[156]

Each party gives its unconditional consent to these arbitration mechanisms according to Paragraph 3, and according to Paragraph 8 ensures by technical measures the efficient enforcement and payment of possible remedies. In Paragraph 5(b) of Article 26, the investor is granted the right to require the arbitration be held in a state that is a Contracting Party to the New York Convention. Holding an arbitration in a Contracting Party state to the New York

[147] Energy Charter Treaty. Article 10(1).
[148] See for example Miljenić. Pages 54-73.
[149] Eberhardt, Pia, Olivet, Cecilia and Steinfort, Lavinia. One Treaty to Rule Them All - The Ever-Expanding Energy Charter Treaty and the Power It Gives to Corporations to Halt the Energy Transition. Corporate Europe Observatory (CEO) and the Transnational Institute (TNI) Brussels/ Amsterdam. 2018. Page 17.
[150] Dolzer, Rudolf. Fair and Equitable Treatment: Today's Contours. 12 Santa Clara Journal of International Law 7. 2013. Page 11.
[151] Energy Charter Treaty. Article 26(3)(b)(i). These states include Norway and Hungary.
[152] Energy Charter Treaty. Article 26(1)
[153] Energy Charter Treaty. Article 26(2)
[154] Energy Charter Treaty. Article 26(2)(a)
[155] Energy Charter Treaty. Article 26(2)(b)
[156] Energy Charter Treaty. Article 26(4)(a-c)

Convention ensures its Articles on award enforcement apply. This means that the award will be recognized and enforced in any other state party to the Convention.[157] ECT Article 26, by making this reference to the New York Convention as well, is indeed designed to ensure an array of possibilities to dispute resolution to the investor, and an efficient enforcement of the awards.

For the purposes of this thesis, one more feature of the ECT must be mentioned. Under Article 47(3), for a period of 20 years on from the time a Contracting Party withdraws from the ECT, all relevant provisions remain applicable to investment that have been made at the time. This so-called sunset clause gives a final touch to the Treaty from an investor point of view. Even after withdrawing from the ECT, a state is bound by it, and the investments a private party has made, are protected.[158]

3. EU law and International Investment Agreements

3.1 The clash of civilizations: the case of ECT and recent CJEU jurisprudence

This section will form an essential sub-argument through introduction of facts and their interpretation for my full argument. The Court of Justice of the European Union (CJEU) jurisprudence, in which the EU law primacy over the international investment law regime is assumed, has developed dramatically in the recent years. This is also the change in circumstances that makes the construction of the full argument of this thesis possible. For these purposes, the discussion on EU law primacy is accounted for in relevant parts. The CJEU logic of how that leads to intra-EU BITs and the ECT arbitration clause being useless and unlawful in intra-EU disputes, is presented. No attempt for a deeper discussion of how different actors perceive the situation, or a discussion of a conflict of legal regimes, is within the scope of this thesis.[159] The CJEU has still explicitly left open extra-EU arbitration on ECT basis, expressing: “the ECT may require Member States to

[157] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations [UN]) 330 UNTS 3. Article III.
[158] Energy Charter Treaty. Article 47(3).
[159] For a master’s thesis focused on this question, see for example Sorvaniemi’s thesis supra at 63.

comply with the arbitral mechanisms for which it provides in their relations with investors from third States".[160] This forms the limitation to the argumentation in this thesis to intra-EU arbitration.

I take the current CJEU view of EU law primacy, although highly disputed, over both Member State national law and international law as a legal premise[161] [162] [163], and use it in making the final argument. I will argue that the *Achmea/Komstroy* case law is a fundamental change in circumstances that directors must take into account when making investment decisions: so fundamental, that read together with the rising climate litigation trends, it should lead to the conclusion investing in fossil energy does not enjoy legal protection within the EU, and therefore, no more fossil investments should be made from a risk management and business strategy point of view.[164] As Eckes and Ankersmit note: "Real-life pressures, such as big EU-based multinational energy suppliers, for example RWE and Uniper, bringing arbitration cases on the basis of the ECT against national climate policies make this a highly relevant legal question."[165] [166] [167] [168]

From the EU law viewpoint, the discussion has revolved around mainly two articles of the Treaty on the Functioning of the European Union (TFEU). These articles are Article 344 and Article 267. The rule provided by Article 267 is that The CJEU shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is

[160] Case C-741/19, République de Moldavie v Komstroy LLC ECLI:EU:C:2021:655. Paragraph 62.
[161] See for example Judgment of 6 March 2018, Achmea, C-284/16, EU:C:2018:158. Paragraph 33 and the case-law cited.
[162] Opinion 1/17 (EU-Canada CET Agreement), of 30 April 2019, EU:C:2019:341. Paragraph 109 and the case-law cited.
[163] For discussion, see Fecák, Tomáš. International investment agreements and EU law. Kluwer Law International B V. 2016. Page 399.
[164] In addition to Achmea/Komstroy case law, see at least Case C-118/07 Commission v. Republic of Finland, ECLI:EU:C:2009:715. The Court found that by not having eliminated incompatibilities with the Amsterdam Treaty Article 307 and the second Paragraph in its bilateral investment agreements, Finland has failed to fulfil its obligations as a Member State Paragraph 50.
[165] Eckes and Ankersmit. Page 17.
[166] RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4.
[167] Uniper Benelux N.V. v. Kingdom of the Netherlands, ICSID Case No. ARB/21/22.
[168] Eckes and Ankersmit. Page 17.

raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling.[169] The CJEU has in its recent jurisprudence given deeper meaning to the nature and essence of EU law. The starting point is the constitutionalism autonomy of EU law as a legal system.[170] [171] [172] The relevant legal rule of Article 344 is that Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for by the Union.[173] These rules will be discussed through case law next.

3.2 The build-up to Achmea in case law – the question of primacy

The CJEU asserts in *Achmea* the following:

> "According to further settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal

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[169] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1 (TFEU). Article 267.

[170] For earlier takes on the conflict of legal systems, see for example Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] EU:C:2008:461.

[171] In the MOX plant case, a breach of TFEU 344 was pronounced to have happened as EU proceeding had not preceded the UNCLOS proceeding, and the UNCLOS proceeding yields a binding, final verdict. Case C-459/03 Commission of the European Communities v Ireland, ECLI:EU:C:2006:345.

[172] Niemelä, Pekka. Relationship of EU law and bilateral investment treaties of EU member states: treaty conflict, harmonious coexistence and the critique of investment arbitration. University of Helsinki. 2017. Page 138.

[173] TFEU. Article 344.

> relations binding the European Union and its Member States reciprocally and binding its Member States to each other."[174] [175] [176]

This autonomy and constitutional nature of EU law is meant to exist within the Union and in its Member States. The primacy of EU law originally was primacy over its Member States law. However, as the Member States are as sovereign states free to enter international agreements, the question has arisen, whether for example, EU law or international investment law should have primacy. The discussion in its current form has its starting point in the Lisbon Treaty of 2009, when the EU assumed exclusive competence in foreign direct investment.[177] [178] [179]

Some of the most significant decisions pre-Achmea and Komstroy include *Electrabel*[180], *Charanne*[181] and *RREFF*[182] [183]. In *Electrabel*, a case concerning the ECT and EU relations, this exclusive competence showed in the Commission's argumentation as it claimed for the first time that the claim should have been brought against the EU and not Hungary. This was also where the intra-EU jurisdictional objection took form. Intra-EU jurisdictional objection refers to an argument that the Member States or the EU have not agreed to submit intra-EU disputes to international arbitration.[184] Therefore, the arbitral tribunal would have no jurisdiction in intra-EU cases, and should dismiss them. However, in the event of inconsistency between EU law and the ECT, the tribunal held, EU law should

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174 Judgment of 6 March 2018, Achmea, C-284/16, EU:C:2018:158, Paragraph 33 and the case-law cited.

175 Opinion 1/17. Paragraph 109 and the case-law cited.

176 Komstroy. Paragraph 43.

177 Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

178 In accordance with Article 3(1)(e) TFEU, the European Union has exclusive competence with respect to the common commercial policy. This includes foreign direct investment.

179 Opinion 2/15 of the Court (Free Trade Agreement between the European Union and the Republic of Singapore) [2017] EU:C:2017:376. Paragraph 305.

180 Electrabel S.A. v Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012.

181 Charanne and Construction Investments v Spain, SCC Case No. 062/2012, Award (Unofficial English translation by Mena Chambers), 21 January 2016, [211]-[212].

182 RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, [38]

183 Isolux Netherlands, BV v Kingdom of Spain, SCC Case No. 2013/153 Award (Unofficial English translation), 17 July 2016

184 Electrabel.Paragraphs 4.150-4.151.

prevail.[185] The legal discussion of the primacy question continued in *Charanne*. The tribunal's position was that EU law cannot prevail in the event of conflict as the application of the TFEU 344 cannot be so broad it prevents Member States from submitting treaty interpretation outside EU.[186] In addition, EU itself has signed the ECT.[187] In *RREEF* it was established that the ECT is the constitution of the tribunal, and logically the tribunal has to ensure the instrument its jurisdiction is based upon, is applied.[188] As noted above in section 2.1, there is no doctrine pf precedent in international law, and even less in the arbitral tribunal jurisprudence. This is visible in the contradicting positions they have taken on the question at hand. The CJEU, on the other hand, is famous for consistently referring to its own case law.

The CJEU has discussed the question of primacy and its practical implications as well. The *Opinion 1/17* of CJEU concerns the conditions under which the EU may become a party to an international agreement including a dispute settlement clause.[189] The case in focus is Canada-EU Comprehensive Economic and Trade Agreement (CETA). The arbitration system must, firstly, guarantee that arbitration panels do not interpret EU law 'other than the provisions of the [international investment agreement]' and secondly, not have 'effect on the operation of the EU institutions in accordance with the EU constitutional framework'.[190] The *Opinion 1/17* concerns extra-EU arbitration. Eckes et al conclude that the ECT regime certainly interpret EU law as international law and interpret EU policies in the light of the ECT.[191] Therefore, it would go against the CJEU's conditions even for extra-EU arbitration. *Opinion 2/13* concerns the accession of the EU to the European Convention on Human Rights.[192] There, the Court established that the EU legal order must be interpreted and applied separately and in isolation of member states' legal orders, and of international

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185 Electrabel. Paragraph 4.191.
186 Charanne. Paragraphs 433-439.
187 Ibid. Paragraphs 444-445.
188 RREEF Paragraph 75.
189 Court of Justice, request for an opinion submitted by Belgium on 13 October 2017, opinion procedure 1/17. Paragraph 138.
190 Opinion 1/17. Paragraph 119 and elaborated in Paragraphs 120 et seq. and 137 et seq.,
191 Eckes. Page 26.
192 Opinion 2/13 of the Court (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms) [2014] EU:C:2014:2454.

law. The review by the Court of the EU's fundamental rights cannot be prejudiced by international agreements.[193] [194] Both Opinions reflect the CJEU's position of what the primacy of EU law means in practice.

3.4 Achmea

The CJEU wanted to clarify the issue of primacy. In *Achmea*, it was able to do so. It used argumentation leaning on the essential characteristics of investment arbitration. These were the possibility to interpret and apply EU law, being independent of the EU judicial system and the very limited means to reviewing of awards. This then, was a risk to the appliance of EU law in its full effectiveness.[195] At the heart of the EU legal system is the Article 267 TFEU, which establishes the preliminary ruling mechanism.[196] If there is a question concerning the interpretation of the EU Treaties, or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, any court of tribunal of a Member State may request the CJEU to give a preliminary ruling on the question, if the court of tribunal considers a decision on the question is necessary to enable it to rule on the issue.[197]

The *Achmea* case originated as a preliminary ruling by the German Federal Court of Justice. The legal question was, whether EU law would preclude applying an arbitral clause in an international investment agreement between two EU Member States. The dispute was between Slovakia and the Dutch investor Achmea.
The CJEU ruled that the parallel procedure of investment arbitration in intra-EU cases, calls into question the principle of mutual trust between member states, and the principle of sincere cooperation. Article 267 of TFEU ensures and preserves the "particular nature of the law" established by the EU Treaties.[198] Arbitral tribunals, according to the CJEU, are not tribunals and courts of Member States as meant in the Article 267, and therefore not even theoretically eligible to consult

[193] Niemelä. Page 133.
[194] The Court referred to Case 11/70, Internationale Handelsgesellschaft, ECLI:EU:C:1970:114. Paragraph 4, and to Kadi & Al-Bakaraat. Paragraphs 281-285.
[195] Achmea. Paragraph 56.
[196] TFEU. Article 267.
[197] TFEU. Article 267.
[198] Achmea. Paragraph 58.

the CJEU.[199] In practice, they have not been willing to do that either. The CJEU went on to state in its verdict, that the arbitration mechanism established in the BIT in question could "prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law"[200] and that the arbitration mechanism "has an adverse effect on the autonomy of EU law."[201]

As a legal instruction of interpretation of EU law, CJEU stated that "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."[202] In other words, intra-EU arbitration clauses were declared incompatible with EU law. In a following Communication the European Commission confirmed this position, and went on to proclaim that intra-EU BITs are no longer necessary in the EU single market. Specifically, the Commission mentioned the arbitration tribunals established under the Energy Charter Treaty as an example of a mechanism incompatible with EU law. The Commission directly stated that investor-state arbitration clauses in the intra-EU BITs undermine the system of legal remedies provided for in the EU treaties and in that way also undermine the autonomy, primacy, effectiveness and direct effect of EU law.[203] The Commission went on to emphasize, how the EU legal system offers effective protection for cross-border investors in the single market, and protects other legitimate investor interests.[204] Additionally, the Member States have pre-*Achmea* used the argument that interpreting the wording of the ECT in good faith, and using the supplementary means of interpretation referring to the Articles 31 and 32 of the VCLT would mean that the EU would take care of all

[199] Achmea. Paragraph 49.
[200] Achmea. Paragraph 56.
[201] Achmea. Paragraph 59.
[202] Achmea. Paragraph 60.
[203] Commission 'Protection of intra-EU investment' (Communication, 19 July 2018) COM/2018/547. Page 3.
[204] Ibid. Page 26.

the necessary guarantees of investment among Member States.[205] This position was pronounced and confirmed by the Commission in its post-*Achmea* Communication.

The Commission has asked the Member States to end their intra-EU BITs already in 2015.[206] Additionally, it has submitted amicus curiae briefs on the topic[207] [208], and started infringements proceedings against certain Member States for not taking action to end the intra-EU BITs.[209] The Commission has argued that the Union's own system of protection for investments is better and does not need competitors in intra-EU investment arbitration. This is the main argument, and I believe, motivation, why the EU with the faces of Commission and CJEU have an interest in putting a stop to investment arbitration procedures among Member States. With multiple investment protection regimes in place, it may look like the EU mechanisms themselves are not strong enough. This then, is an unacceptable conclusion to the Commission, whose building blocks and basic justifications for existence are indeed freedom of capital and trade. Investment is a vital part of this, and the EU should be a single market with its internal rules clear on investment among other applications of a single market area.

From this internal EU point of view, the objection to Member States treating their investments among themselves as foreign investment, and applying international investment law on the disputes does seem contradictory with the single market thinking. It is remarkable how directly to the core of the essence of the EU the single market and its legal ramifications go. It is therefore understandable from the point of view of the political project named EU, that the functioning and primacy of the single market go unchallenged. The CJEU's and Commission's positions reflect this. However, one can make the observation that the CJEU and

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[205] Charanne. Paragraphs 211-212.

[206] Commission asks Member States to terminate their intra-EU bilateral investment treaties, Press release, 18 June 2015, https://europa.eu/rapid/press-release_IP-15-5198_en.htm+&cd=1&hl=it&ct=clnk&gl=it.

[207] See for example RREEF. Paragraph 20.

[208] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, Final Award (4 May 2017), ICSID Case No. ARB/13/36. Paragraph 70.

[209] Dahlquist, J., Lenk, H., Rönnelid, L. The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden', Swedish Institute for European Policy Studies, European Policy Analysis no. 4. 2016.

Commission speak with one voice in the matter, the Commission being a political organ advancing the interests of the Union, and the Court making sure EU law is being applied effectively and correctly. Since the issue at hand, EU Member States' rights to have contracts about investment arbitration among themselves, is not clear but disputed, one can point out the mixing of law and politics here, referring back to the methodological stance taken on the political and interest driven nature of law, as presented in Sections 1.1 and 2.1.

3.5 Komstroy

Case *Komstroy* is a continuation to the discussion, and a specific stop to the speculation, whether the conclusions made in *Achmea* would apply to the ECT as well. The CJEU position was that they do apply, and the Commission's message in the Communication cited above, was once more confirmed.

Komstroy was originated as a request for a preliminary ruling. The legal question at hand was whether a contract-based claim for supplying electricity would constitute an investment in the meaning of ECT. The dispute was between a Ukrainian investor, Komstroy LLC, and the Republic of Moldova. CJEU based its jurisdiction on Treaty of Lisbon, according to which, the European Union has exclusive competence in foreign direct investment pursuant to Article 207 TFEU, and in non-direct investment, shared competence.[210] [211]Therefore, CJEU saw it can interpret the ECT.[212] CJEU referred to its own practice, *Achmea* and the case law cited, and confirmed that an international agreement cannot affect the allocation of powers laid down by the treaties and subsequently, the EU legal system. In this context, the principle was given meaning through TFEU 344, recalling that under the Article, Member States have committed themselves not to submit any dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.[213] The Court further argued that the autonomy of EU law in relation to both the law of the Member States and to international law is justified. Essentially, the Court

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[210] Komstroy. Paragraph 26.
[211] See also Opinion 2/15. Paragraphs 82, 238 and 243.
[212] Komstroy. Paragraph 27.
[213] Opinion 2/13. Paragraph 201.

related this autonomy to the constitutional nature of the European Union, and the nature of EU law. The relevant notion about that law is that has an independent source - the Treaties - and that the law has direct effect on the Member States and their nationals. This, according to the Court, has created "a structured network of principles, rules and mutually independent legal relations binding the European Union and its Member States reciprocally and binding its Member States together."[214] [215] [216]

Further, taking a dispute between an investor of one Member State and another Member State from the judicial system so that the full effectiveness of EU law is not guaranteed cannot be permitted.[217] This would risk the autonomy and the particular nature of EU law, stemming from the Treaties and ensured principally via the preliminary ruling function provided in the Article 267 TFEU.[218] CJEU ruled, then, that the Article 26(2) ECT is not applicable to intra-EU disputes, when an investor of a Member State has made an investment in another Member State.[219]

3.6 Consequences of Achmea/Komstroy

Based on *Achmea/Komstroy,* Member State courts are obliged to refuse enforcing intra-EU awards, and Member States themselves are obliged to end the illegality under EU law. Investment arbitration tribunals, on the other hand, are not bound by EU law. This has created legal uncertainty, and a conflict of regimes. This in turn has already resulted in law firms advising companies to move their seat outside the EU.[220] In addition to moving their seats, to avoid legal hurdles altogether, tribunals challenge the *Achmea/Komstroy*. For example, the arbitral tribunal in the case *Infracapital v. Kingdom of Spain* has, after *Komstroy,* rejected

[214] Komstroy. Paragraph 43.
[215] Achmea, Paragraph 33 and the case-law cited.
[216] Opinion 1/17. Paragraph 109 and the case-law cited.
[217] Komstroy. Paragraph 62.
[218] Komstroy. Paragraph 63.
[219] Komstroy. Paragraph 66.
[220] Jones Day (Michelle Bradfield, James Egerton-Vernon, Melissa Stear Gorsline, Fahad A. Habib, Sylvia Tonova and Philip J. Devenish), Climate Change and Investor-State Dispute Settlement. February 22, 2022. Available at www.jonesday.com/en/insights/2022/02/climate-change-and-investorstate-dispute-settlement.

Spain's request to reconsider the tribunal's jurisdiction under ECT.[221] The tribunal rejected the intra-EU objection in a similar manner to pre-*Komstroy*, and has stated that *Komstroy* ruling is irrelevant to its rulings on jurisdiction and on liability.[222] Moreover, in intra-EU arbitration situations under the ECT, Member States courts would likely ask for a preliminary ruling on enforcement in unclear situations from the CJEU. The awards would then not be enforced within the EU, and could also be annulled.[223]

3.7 Conclusions: ECT is incompatible with EU law

Concluding on the legal effects of *Achmea, Komstroy* and other discussed CJEU case law, the ECT is incompatible with EU law from the EU law perspective. This is due to the risk it poses to the autonomy of EU law. The EU cannot be a part of international agreement binding the EU to dispute settlement mechanisms that may have an adverse effect on EU law. The investment tribunal should not interpret and apply rules of EU law because they do not have the option for preliminary ruling by the CJEU. In *Komstroy,* the CJEU noted that the ECT tribunals in function under Article 26 of ECT are required to interpret and apply EU law.[224] The ECT does not require the tribunals to follow the interpretation of CJEU and EU institutions of EU law, nor does it say that domestic Member State courts are not bound by the tribunal interpretation of EU law. As clarified in the *Opinion 1/17,* the EU cannot conclude international agreements restricting its own regulatory autonomy through dispute settlement mechanisms. The ECT contains the same risky issues as CETA, like assessed in *Opinion 1/17* such as binding awards, compulsory jurisdiction of tribunals, and a broad definition of investment.

The ECT was negotiated more than 15 years before the EU gained competence in foreign direct investment, long before the EUs own investment law policy, and before its political goal of reforming the regime of international investment. No boundaries were set by the CJEU, under what conditions the EU can submit to

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[221] See also Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain, SCC Case No. 2015/063, Final Award, 15 February 2018.
[222] Infracapital. Paragraphs 107 and 116.
[223] Pekka Niemelä and others, 'Risky Business: Uniper's Potential Investor-State Dispute against the Dutch Coal Ban' (2020) https://www.ejiltalk.org/risky-business-unipers-potential-investor-state-dispute-against-the-dutch-coal-ban/.Accessed 8.8.2022.
[224] Komstroy. Paragraph 50.

international dispute settlement provisions. In addition to the CJEU pronounced incompatibility with EU law, then there is the argument that the ECT is outdated, and not in line with modern policy goals.[225] In case intra-EU arbitration will be done in EU law framework and in the judicial procedure the EU provides, investor protection will still be in place. Interestingly, although the Commission consistently argues that the investor protection offered by the EU is equivalent to that offered in BITs[226], several member states have raised the concern that investor protection would weaken.[227] Since the Commission and the EU member states are committed to climate action, I argue, practically this must mean weaker protection for fossil investments. Indeed, although due to the sunset clause, the Commission strategy has been to advocate for the modernization of the ECT rather than withdrawal, in 2020, the Commission confirmed it is ready to withdraw from the ECT, "If core EU objectives, including the alignment with the Paris Agreement, are not attained within a reasonable timeframe." [228] This commitment is visible in the fresh deal broken between the German government and Uniper, banning Uniper from challenging the Netherland's coal ban law, as well. Concluding, the ECT is incompatible with EU law from both legal and political viewpoints. This will be treated as a fact in assessing political risk and the duty to manage it in section 5.

4. Company law context: fiduciary duty

4.1 Traditional understanding

The next building block of the argument of this thesis is retrieved from company law context. In a company, decision making rights are generally given to the directors and management of a company. The owners of a company, the shareholders, are structurally separated from decision-making. This separation of ownership and control has been established by the ICJ as well, as cited above in section 2.1. This separation means that the shareholders would be left exposed to

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[225] Eckes and Ankersmit. Page 58.
[226] Commission. 18 June 2015, IP/15/5198.
[227] "Intra-EU Investment Treaties": Non-Paper from Austria, Finland, France, Germany and the Netherlands. Paragraph 6.
[228] Parliamentary questions, Answer given by Executive Vice-President Dombrovskis on behalf of the European Commission, 2 December 2020. Available at https://www.europarl.europa.eu/doceo/document/P-9-2020-005555- ASW_EN.html

the opportunism of management, were there no rules to keep the managers of the company accountable.[229] In literature, this conflict of interests between managers and shareholders is called the principal-agent problem or the agency problem.[230] [231] The content of the principal - agent doctrine is that the agent has the duty of advancing the interest of the shareholder collective.[232] This interest is to produce long-term increase in the value of the company stock or in other words, maximize the profit of the investment shareholders have in the company. The general features of a fiduciary relationship in addition to the separation of ownership from control or management asymmetrical information on decisions and results and open-ended obligations.[233] The rules designed to induce accountability are called fiduciary duties, and they appear in the fiduciary relationship, between shareholders (principal) and company directors (agent). They are the duties of acting loyally, owed by the directors of the company to the shareholders. In anglo-american literature, these duties are divided into duty of care and duty of loyalty, followed with a conceptually newer sub-duty of oversight.

The starting point of the fiduciary duties is the purpose of a corporation. It is the topic of much literature, what the exact formulation of the theoretical purpose of a corporation should be. The minimal definition of the purpose is that the corporate activity should produce a profit to the shareholders. More advanced, modern definitions include a qualification: the profit should come in the form of long-term increase in the value of the stock of the company. This definition is remarkably similar across major jurisdictions.[234] It is through the purpose of a corporation and the division of decision making powers and ownership that leads the directors of a company to risk assessment. As agents, their duty is to their best ability to assess, what kind of risk-taking will yield the maximum profit to the principal-shareholder. It depends on the understanding of the purpose of the corporation, of

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[229] Williamson, Oliver. The Economic Institutions of Capitalism. Simon & Schuster. 1985. Pages 47–49.
[230] On the principal -agent doctrine i.e. Mähönen. Pages 107–150.
[231] Ross, Steven. The Economic Theory of Agency: The Principal's Problem, 63 American Economic Review 134. 1973.
[232] Pratt John W and Richard Zeckhauser. Principals and Agents : The Structure of Business. Harvard Business School Press. 1985.
[233] Cooter, Robert D. & Freedman, Bradley J.: The Fiduciary Relationship: Its Economic Character and Legal Consequences. New York University Law Review 1991. Page 1051.
[234] Kraakman et al. Page 22.

how long-term increase in the value of the stock vs. immediate profits are sought after.[235]

Since the rationale for having legal concepts like fiduciary duty is to ensure loyalty and not guarantee any particular outcome of business - which would not even be possible due to the nature of business characterized by risk taking and uncertainty on reward or loss - the content of the duty cannot be defined in exact terms. Therefore, fiduciary duty is about the agent's own business judgment, and loyalty. These two concepts are used to determine, whether the agent has fulfilled their duties. Assessing the correct level of risk taking the principal is expecting is at the core of the agent's duties, and it must be done case by case according to each principal's will.[236] Some scholars have presented models on how to arrive at the correct juncture of risk and return, but it is clear nevertheless that the situation requires judgment from the agent.[237] [238]A CEO of a company at its growth stage, for instance, is expected to take bigger risks than a state-owned energy company. In literature, the logic of economics is repeated as the basic principle of finding the content of fiduciary duty.[239] It is about fulfilling the will of the principal in the most efficient way possible.

The concept of fiduciary duty is most explored and developed in the jurisprudence of the United States. This is due to the developed capital markets in comparison to for example, Germany.[240] US courts are more willing to consider managerial behaviour legally, as the US law encourages shareholder lawsuits. Also the company ownership structure is more fragmented in the US than in most of the other jurisdictions. This, according to Kraakman et al, induces more litigation as means to counter opportunism from directors, and shareholder-manager conflicts are more common in the US context as a result.[241]

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[235] Cooter. Pages 1045–1075.
[236] Cooter et al. Page 1063.
[237] Mähönen et al 2015. Page 369.
[238] Cooter et al. Page 1062.
[239] Cooter et al. Page 1067.
[240] Kraakman et al. Page 207.
[241] Ibid. Pages 53 and 116-7.

The said concentration of the question in the US context does limit the possibilities to apply the implications of fiduciary duty on the EU context. In Europe, the creditor-orientedness of the logic of company law produces lawsuits against managers mostly in the event of insolvency.[242] Kraakman et al even argue it is almost impossible for a shareholder to sue a manager for disloyalty in Germany: the legal culture emphasises reputational penalties instead of litigation.[243] However, the theoretical discussion is fairly well applicable across jurisdictions, and the suing of directors is spreading through i.e. climate litigation to the EU as well as discussed in section 1.1. Moreover, during the past years, the European Commission has found its unique way of achieving the goals of fiduciary duties through i.e. the Non-Financial Disclosure Directive N.2014/95, discussed below in section 4.5.1.

As an additional limitation, and possibly most importantly to counter the possibilities to argue for the unlawfulness of fossils investments, investment decisions in general fall into the fully delegated decisions that the board is allowed to make without consulting shareholders in all major jurisdictions.[244] This is due to the economic logic: who has the best expertise and the most information to make the best decisions. It is clear that the directors have more information than the shareholders, and therefore they are best fitted to make investment decisions. Courts are reluctant to review these decisions.[245] However, a court may assess whether a decision has been made in good faith.[246] The contents of fiduciary duty are developed in jurisprudence precisely to allow for assessment of this decision-making process.

Directors do have the duty of care in making investment decisions, too. Due to the structure of the company, nobody else has the chance to make better decisions. It can be argued, then, that the duty of care is therefore emphasised: the only way to make sure shareholder money is well spent and safe from the opportunism of the

[242] Ibid. Page 118.
[243] Ibid. Pages 129-30.
[244] Ibid. Page 151.
[245] Especially the ex post definition of duty of care is notoriously difficult, and would make directors too risk everting if regulated too specifically ex ante. Kraakman et al. Page 52.
[246] Mähönen et al. Page 379.

managers' incentive to produce short term value instead of long-term value, is to require a diligent decision-making process, including a sound risk assessment, case by case.

This leads us to the contents of duty of care, and duty of loyalty.

4.1.1 Duty of care

According to the anglo-american doctrine, the duty of care can be understood by limiting it through the business judgement rule. According to the rule, the directorship of the company is generally safe from damage claims if the business decision has been made in good faith. This is true also in case it later on becomes clear the decision lead to loss of profit or other bad consequences. According to the rule, courts should not evaluate business decisions made in good faith. The use of the rule has been argued for based on the fact that the courts do not have the prerequisites to judge business decisions. In addition, the fear of being held personally liable would make the directorship overly conservative and cautious, and would not persuade competent and talented people to join the company leadership.[247] These arguments are, again, a part of the economic logic of company law.

The business judgement rule has been formulated in Delaware Supreme Court cases Aronson v. Lewis[248], and Brehm v. Eisner[249], and repeated in the In re the Walt Disney Co. Derivative Litigation[250]. Quoting Aronson v. Lewis, the business judgment rule is based on the assumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[251] According to the rule the board of the company have fulfilled their duty of care if they

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[247] Salonen, Aki. Osakeyhtiön hallituksen jäsenen huolellisuusvelvollisuus. Werner Söderström Lakitieto Oy. Helsinki. 2000. Page 67.
[248] Aronson v. Lewis, 473 A.2d 805 (Del. 1984).
[249] Brehm v. Eisner, 746 A.2d 244 (Del. 2000).
[250] In re the Walt Disney Co. Derivative Litigation, 2006 WL 1562466, 2006 Del. LEXIS 307 (Del. 2006).
[251] Aronson v. Lewis. Paragraphs 805, 812.

1) Do not have a conflict of interest in the matter and are not self-contracting
2) Process the issue and make a decision in it. Being passive is not protected by the rule.
3) Acquire and require sufficient information before making the decision. To make the decision, the board is obliged to acquire all relevant information that is reasonably available, and that can have impact on the decision; and
4) Act in a manner that is not completely irrational or unfounded. The decision has to make business sense and must not be flagrantly erroneous.

To be free from liability and protected by the business judgment rule, then, the directorship must acquire all relevant information, given that this information is reasonably available[252], must be able to justify the decision from a business angle[253] and not have a conflict of interest. If the decisions taken are completely unfounded or irrational, the business judgement rule does not protect the directors having taken them.[254] [255] [256] [257] Since almost all decisions made by the directorship is a business decision, the rule gives extensive protection.

In a landmark case giving meaning to the duty of care, *Smith v. Van Gorkom,* the Delaware Supreme Court established a standard of gross negligence is the standard of culpability for board members to breach the duty of care and be held liable personally.[258] In the case, a board of a company Trans Union decided to sell the company without previously agreeing to discuss a sale; with no valuation study conducted and with the directors not asking question on the CFO's report in a board meeting summoned urgently.[259] The Court held that the board had not no

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[252] Smith v. Van Gorkom, 488 A.2d 858 (Delaware Supreme 1985). Paragraph 874.
[253] Aronson v. Lewis. Paragraph 815.
[254] Savela, Ari. Arvio osakeyhtiölain vahingonkorvaussääntelyn kehittämistarpeesta ja –mahdollisuuksista. Expert opinion provided for the Ministry of Justice of Finland in 22.11.2001. Available at www.om.fi/19380.htm.Pages 23-24.
[255] Savela, Ari. Vahingonkorvaus osakeyhtiössä. Talentum Media Oy. Helsinki. 2006. Page 88.
[256] Rapakko, Timo. Osakeyhtiöoikeuden huolellisuusvelvoite kehittyneillä pääomamarkkinoilla. Lakimiesliiton kustannus. Helsinki. 1990. Pages 51-62.
[257] Dotevall, Rolf. Skadeståndsansvar för styrelseledamot och verkställande direktör. Nordstedts Förlag AB. Stockholm. 1989. Pages 149-156.
[258] Smith v. Van Gorkom. Paragraph 872.
[259] Ibid. Paragraphs 875-878.

sufficient information to make a an informed business decision, and therefore was not protected by the business judgment rule.[260] The board

"(1) Did not adequately inform themselves as to Van Gorkom's [CEO] role in forcing the 'sale' of the Company and in establishing the per share purchase price; (2) were uninformed as to the intrinsic value of the Company; and (3) given these circumstances, at a minimum, were grossly negligent in approving the 'sale' of the Company upon two hours' consideration, without prior notice [of the agenda of the meeting], and without the exigency of a crisis or emergency.[261]

The business judgement rule has spread as a standard yardstick of duty of care into many jurisdictions, Germany and Finland included.[262] In German law, the duty of loyalty ("Treuepflicht") is a functional legal concept whereas the duty of care ("Sorgfaltspflicht") has got less significance in practice.[263] In the Finnish formulation, the duty of care has been fulfilled when a decision has been made based on the relevant, proper information required by the situation; the decision made is logical, and if the decision making has not been influenced by directorship's conflict of interest. Assessing what is reasonable care, then, is a demanding task. Too much care will result in lack of decisions, and definitely exaggerated risk avoidance that will end up taking up too much of the directorship's time, and preventing it from taking also the necessary risks needed in business. Cooter et al, following the efficiency logic of economics, have argued that the requirement of reasonable care means that the fiduciary must "exert herself so long as the cost of such exertion does not exceed the resulting benefit to the principal."[264]

Business judgment rule is based on the assumption of sufficient information and good faith. It does not protect from exceeding competence ultra vires, nor illegal action, including breaking the duty of care. It does not allow for wilfulness or

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[260] Ibid. Paragraph 874.
[261] Ibid. Paragraph 872.
[262] HE 109/2005 vp. Page 195.
[263] Gelter, Martin. Helleringer, Geneviéve. Fiduciary Principles in European Civil Law Systems. Working Paper N° 392/2018. Fordham University School of Law. 2018.
[264] Cooter et al. Page 1058.

gross negligence. The burden of proof lies within the party that claims there is a flaw in the decision made. If the applicant is able to show facts removing the protection of the business judgment rule, the burden of proof is reversed and the directors must show that no damage is caused. The duty of care is an active duty, which means the business judgment rule does not protect the directorship from passivity and omitting making decisions. In contrast, the active decision to do nothing is covered by business judgment rule.[265]

Helpful in determining whether a decision is well founded and makes business sense in the way the business judgement rule requires is to return to the purpose of the company: does the decision increase the long-term value of the stock of the company, and therefore create value for shareholders? If the decision taken cannot lead to this end, it cannot be protected by the business judgement rule. Some scholars argue, however, that since the norm to produce profit for the shareholders is a sanctionless norm, it can be treated merely as one of criteria when determining whether the directors have fulfilled their duty of care. Often the legal question is about the correct level of risk taking.[266] For example, in relation to climate risk, acquiring the necessary information and gross negligence in considering that information accordingly, Williams has stated a breach of duty of care may occur.[267] This will be discussed below from section 4.2 on.

4.1.2 Duty of loyalty

The content of the duty of loyalty is less relevant to the argument of this thesis, but it will be outlined here briefly for a supplementary argument. In short, the duty of loyalty refers to the prohibition directed at the agent to use the resources on their responsibility for their own good. The agent must exhibit loyalty towards the company and all of its shareholders. This duty goes further than the basic contractual duty to act in good faith. The fiduciary duty of loyalty is stricter and more extensive than the basic standard of having good faith in relation to one’s

[265] Savela. 2006. Page 89.
[266] Dotevall. Page 417.
[267] Williams, Cynthia A. Fiduciary Obligations and Climate Change. Working paper for Weinberg University Event. 2021. Page 2.

contractual partner. In addition, the duty of loyalty is owed by the agent to the principal only, not the other way around.[268]

In relation to fossil investment, a theoretical connection between director loyalty and the returns may be made. As fossil investments are in the current situation increasingly of short-term nature at least within the EU, as will be discussed in section 5, a director making business decisions to invest in fossils is reality seeking a short-term profit over long-term increase in value of stock. This serves the director's own interest, as they can change jobs easily. Director's position is well suited to operate in search of short-term personal and shareholder profits. In the energy sector, this phenomenon has been described as the economic green paradox.[269] Because of how value of an energy product is formed on the market, there is an economic incentive to burn as much fossil fuels as possible until they are totally banned and lose their value altogether.

4.2 Fiduciary duty and climate risk mitigation

There is a vivid scholarly discussion on the possibilities of extending the fiduciary duties to cover climate risk mitigation to the extent of filing a successful claim in litigation. Depending on the author, they either see an emerging fiduciary duty to factor in climate action in business and strategy decisions, or they see the space for that kind of argumentation narrow. There is a view that *Smith v. Van Gorkom*, rightly, led to the conclusion that corporate directors should not be financially liable for decisions lacking due care.[270] This is visible in the director exculpatory clauses becoming extremely common after the case. Risley argues that the business judgment rule combined with the standard exculpation clauses prevent almost all avenues for shareholder action for having directors' personal legal liability confirmed by court.[271] Even when an exculpatory provision does not exist, Risley argues, the presumption of good faith along the lines of business

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[268] Mähönen et al. Page 377.
[269] van der Ploeg, Frederick. Withagen, Cees. Is there really a green paradox? Journal of Environmental Economics and Management, Volume 64, Issue 3. 2012. Pages 342-363, DOI.org/10.1016/j.jeem.2012.08.002. Pages 360-363.
[270] Sharfman, Bernard. The Enduring Legacy of Smith v. Van Gorkom. Delaware Journal of Corporate Law. Vol. 33. 2007. Page 287.
[271] Risley jr., Eric J. Sound and Fury, Signifying Nothing: Why Shareholders Suits Are Ineffective to Promote Corporate Response to Climate Change. Boston College Environmental Affairs Law Review 44. 2017. Pages 391, 398.

judgment rule is so strong no case could be successful. This is to avoid any ill-advised judicial second guessing. A relatively modest track record of honesty and "reasonable reliance on some substantive information" will keep directors safe from liability.[272] Bruno comments on this assertion that it is difficult to imagine what kind of honest and reasonable decision at this point of consensual scientific recognition on climate-related massive risks can in reality be taken in the direction of inaction. Is it possible to reasonably choose inaction while simultaneously fulfilling the fiduciary duty of advancing the interest of the company in good faith? Barker believes it is difficult to establish a breach of duty of care even if conscious disregard of stranded assets risks is shown. Business judgment rule would protect those decisions unless an extraneous interest being pursued is shown, such as affiliation with a climate denialist political group or industry.[273]

Risley concludes that the extent of shareholder leverage would be to require the board to insure the company against climate related losses.[274] Apart from that, the fiduciary duty is about conduct, not specific material obligations. The definition of good faith is to "promote the value of the corporation for the benefit of its stockholders" while a failure to act in good faith means acting "with a purpose other than that of advancing the best interests of the corporation".[275] As a part of duty of care includes the duty to carefully consider regulatory change to tackle global warming, and international commitments, such as the Paris Agreement, when developing business strategy, future plans, commitments and scenario analyses. This is how good faith efforts for an informed business decision, and exercise of judgment, shows.[276] As a known financial factor, climate action with its risks and opportunities must be considered by directors, or else they fail to fulfill their duty of good faith.[277] Conceptually, good faith is better understood as the opposite of bad faith. Delaware courts have found bad faith "where the decision is so far beyond the bounds of reasonable judgment that it seems

[272] Risley. Page 411.
[273] Barker, Sarah. An Introduction to Directors' Duties in Relation to Stranded Assets, in: Ben Caldecott (ed.), Stranded Assets and the Environment. Risk, Resilience and Opportunity. Page 210.
[274] Risley. Page 417.
[275] Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 363, 370 (Del. 2006).
[276] Williams. Page 6. There is theoretical disagreement of whether good faith in the context of fiduciary duties is a subset of duty of loyalty or duty of care. Bruno. Page 694.
[277] Bruno. Page 697.

essentially inexplicable on any other ground other than bad faith".[278] The time is near, where it is that far beyond the bounds of reasonable judgment to keep investing in fossils that it seems essentially inexplicable on any other ground other than bad faith. I argue we have passed that point in time already.

Barker asserts that the failure of an energy sector director to consider stranded assets risks in general or in material projects would offer grounds for breach of duty of care review. The responsibility to actively acquire information about stranded assets risks lies with the directors themselves.[279] The failure to obtain and consider such material information reasonably available would be grossly negligent.[280] Risley argues that if inaction is chosen in the best interest of the company, the business judgment rule protects the outcome even if it the results are catastrophic for the company.

As Williams points out, the business judgment rule does not protect inaction per se. By omitting to produce an analysis or modeling the development of the value of the company's fossil investments, it is possible to breach the duty of care. By comparing the demand projections and capital expenditures of 24 U.S. energy companies on exploration and production of oil and gas with the Paris Agreement commitment to limit global warming well under 2 °C, and pursue the limit of 1.5 °C, it was clear that these two are not compatible.[281] U.N. Principles for Responsible Investment has conducted a study of stranded, unburnable assets when the goal of 2 °C is met. The reported economic value of 69 global oil and gas companies is 2.3 trillion dollars is inconsistent with the 2 °C goal.[282] The conclusion must be, then, that some directors somewhere are not on top of their duties to protect their principal's interest.

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[278] Parnes v. Bally Entm't Corp., 722 A.2d (Del. 1999). Paragraphs 1243 and 1246.
[279] Barker. Page 223.
[280] Aronson v. Lewis. Paragraph 814.
[281] As you Sow, 2020: A Clear Vision for Paris Compliant Shareholder Engagement, September 2018, available at https://static1.squarespace.com/static/59a706d4f5e2319b70240ef9/t/5b928615575d1f6f95513a0e/1536329256160/2020-paris-compliant-shareholder-engagement_20180906.pdf.
[282] Carbon Tracker. https://carbontracker.org/reports/2-degrees-of-seParagraphtion-transition-risk-for-oil-and-gas-in-a-low-carbon-world-2/. Accessed 26.8.2022.

4.3 Duty of oversight

Although in many ways hard to catch legally and pinpoint one particular company board's role in climate action, this stranded assets omission and incompatibility with obligatory climate action may be translated into a misstatement of financial position.[283] Significantly, this claim does not require the argument that the Paris Agreement would bind companies as well. It is enough to assume states will act according to their international obligations, and that 2 °C worth climate action will be reached. This amount of climate action necessarily means less fossils than fossil companies predict, will be utilized.

Misstating a company's financial position, then, is a breach of fiduciary duty that directors can be sued for. First constructed as an aspect of duty of care in the *Caremark* case[284] in 1996, duty of oversight was upheld in *Stone v. Ritte*r in 2006 as an aspect of duty of loyalty.[285] Once more, it was upheld in *Marchland v. Barnhill* by the Delaware Supreme Court in 2019.[286] Apart from those cases, it has been extremely difficult to meet this standard of liability, and oversight claims have been largely theoretical.[287]

In the *Marchland* case, a duty of oversight claim was accepted by the Delaware Supreme Court. The company's only product was ice cream, and there was no communication system between the management and the board about the health, safety and sanitation of the practice of business. The ice cream had serious quality problems. There was no indication of discussions on food safety during the years in question. Because the bad quality of the only product of the firm was, according to the Court, a key operational issue for a food company in addition to being a legal compliance issue, the Court found bad faith in the duty of loyalty due to a complete failure in the company's reporting system, or in the lack of that.[288] Williams refers to three other Delaware cases in which the Marchland doctrine of duty of oversight is applied. *In re Clovis Oncology Inc. Derivative*

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283 Ramirez v. ExxonMobil Corp., Civ. No. 3:16-CV-3111K. N.D. TX 2018.
284 Caremark Int'l Inc. Derivative Litigation, 698 A.2d (Del. Ch. 1996). Paragraph 959.
285 Stone v. Ritter. Paragraphs 362, 370.
286 Marchand v. Barnhill, C.A. No. 2017-0586-JRS, June 19, 2019.
287 See for example Citigroup Shareholder Deriv. Litig., 964 A.2d (Del. Ch. 2009) at paragraph 123. and other cases on the 2007-2008 financial crisis. Risley. Page 420.
288 Marchland. Paragraph 806.

Litigation [289], the context was a failure of oversight of pharmaceutical company's research protocols; in *Hughes v. Xiaoming Hu*[290], a failure of oversight was claimed over audited financial statements and internal accounting function and in *Teamsters Local 443 Health Servs. v. Chou*[291], the failure of oversight was over indirect subsidiary's criminal activities in handling pharmaceutical injections.

Williams draws a parallel between the *Marchland* case and any company operating in a climate risky sector. For companies facing immediate physical risks of climate change, such as insurance, coastline property and energy companies, there should be a committee that would take the responsibility to understand those risks, and report them to the full board. If not, an oversight claim might be successful.[292] There are scholars arguing directly against this kind of a view, too, specifically in the U.S. context.[293] Referring back to investment disputes discussed above, in *Charanne,* the diligence of the investors was assessed in relation to their claim for compensation.[294] In *Charanne,* the tribunal held that the investor side should have made a more diligent analysis of the legal framework for the investment. The tribunal cited Spanish law that "clearly left open the possibility" of modification of the specific legal framework that the Claimant had challenged.[295] This should be viewed as analogous to any claims that state climate action was not foreseeable: the Paris Agreement and the EU climate law imply strengthening of emission cuts as discussed above i.e. in sections 1.1 and 1.2. In another case *Frontier,* the arbitral tribunal asserted that "a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the time of the

[289] In re Clovis Oncology Inc. Derivative Litigation, C.A. No. 2017-0222-JRS (Del. Ch. Ct. July 1, 2019).
[290] Hughes v. Xiaoming Hu, C.A. No. 2019-0112-JTL (Del. Ch. Ct. Apr. 27, 2020).
[291] Teamsters Local 443 Health Servs. v. Chou, C.A. No. 2019-0816-SG (Del. Ch. Ct. Aug. 24, 2020).
[292] Williams. Page 13.
[293] See for example Christie, Rebecca. "US separates climate concerns from financial oversight in contrast to EU activism." Bruegel-Blogs, 18 Feb. 2021. Gale Academic OneFile, link.gale.com/apps/doc/A652905256/AONE?u=anon~724d786f&sid=googleScholar&xid=45cbe820. Accessed 2 Aug. 2022.
[294] For longer discussion, see for example Viñales, Jose. Investor Diligence in Investment Arbitration: An Overview of Sources and Arguments, in: Gattini, Andrea. (ed.), General Principles of Law and International lnvestment Arbitration. Brill Nijhoff. 2018.
[295] Charanne. Paragraph 505.

investment."[296] Another tribunal has stated that "economic and legal life is by nature evolutionary.[297] In business literature language, this translates into better oversight and better political risk management, the latter being discussed below in section 5.

In addition, there is U.N. regulation to support the view that a duty of oversight exists or is emerging. The United Nations Human Rights Council's so called Ruggie principles for protecting, respecting and remedying human rights in business. Due diligence in human rights is required, and discussed at length in the Ruggie report.[298] Ever since its publication, climate concern has risen and taken its place as an aspect of human rights due diligence obligations.[299] [300] [301] [302] Concluding, there are emerging legal ramifications for lack of oversight, construed through the concept of duty of oversight and supported a human rights notion.

4.4 The Martin Act and U.S. Federal law

For theoretical purposes and to fill in the picture for the ongoing discussion, three other approaches evolved in the U.S. context are briefly outlined here. This is to further sketch out, how legal argumentation stemming from the climate risk discourse is taking form.

According to the Martin Act[303], a company's internal research and public statements cannot be contradictory, otherwise it is considered a fraud. The Act has

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[296] Frontier Petroleum Services Ltd. v. Czech Republic, UNCITRAL Award, 12 November 2010. Paragraph 287. Cited in Charanne. Paragraph 505.
[297] El Paso Energy International Company v. Argentina. ICSID Case No. ARB/03/15. Paragraph 352.
[298] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. 2011. Print. A/HRC/8/5. E.g. Paragraph 40.
[299] See for example Burger, Michael and Wentz, Jessica. Climate Change and Human Rights (Nairobi: UNEP, 2015) 11; 'Paris Agreement: Preamble', https://unfccc.int/sites/default/files/english_paris_agreement.pdf.
[300] Toft, Kristian. Climate Change as a Business and Human Rights Issue: A Proposal for a Moral Typology. Business and Human Rights Journal, 5(1), 1-27. 2020. DOI:10.1017/bhj.2019.22
[301] Walker, Scott. The meaning and potential of a human rights-based approach to climate change post-Sharma. Alternative Law Journal. 2022. DOI.org/10.1177/1037969X221114216
[302] Macchi, Chiara. The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'. Business and Human Rights Journal 6 1. ISSN 2057-0198. 2020.
[303] N.Y. GEN. BUS. LAW §§ 352–359-H

been applied in the energy sector since 2007. The City of New York sued ExxonMobil[304] and other oil companies in a case built on fraud argumentation. ExxonMobil has pioneered climate change research since 1970s, studying closely, how global warming and the mitigation policies would impact its strategy. ExxonMobil confirmed the certainty of global warming in their internal research. Simultaneously, however, it established a public policy that questioned this certainty.[305] ExxonMobil also used different internal and external carbon prices. Due to this fraudulent, consistent conduct, the company was exposed to far greater risk climate regulation that shareholders were led to believe.[306] Similar argumentation is used in a securities class action, still pending before US District Courts of Texas. *Ramirez v. ExxonMobil* was filed by shareholders alleging material overstatement of the value of the company's reserves and material and misleading class period statements. This fraudulently inflated ExxonMobil's stock, through misrepresenting the information it held.[307]

Under U.S. Federal law, under Rule 14a-8 of the Code of Federal Regulations, an instrument much used by shareholders, has been to submit proposals for more climate information for listed companies, and for more climate responsible policies.[308] The "Micromanagement argument" has been used to counter these proposals, to an extent successfully. Shareholders should not intervene in business decision making on this level, the argument goes.[309]

4.5 Climate risk management in EU law

The jurisprudence on fiduciary duty is more developed in the U.S. than in Europe. This is due to different legal tradition and the general differences between civil and common law systems, but also to the historically more capital-intensive character of the U.S. capital market, as noted in section 4.1. In Europe and specifically within the EU, company law regulation is less litigation and more

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304 City of New York v. Exxon Mobil Corp. 1:21-cv-04807. S.D.N.Y.
305 Poon, Ashley. An Examination of New York's Martin Act as a Tool to Combat Climate Change. Boston College Environmental Affairs Law Review 44. 2017. Page 117.
306 Brown, Tristan R. ExxonMobil is Hit with Its Most Important Climate Lawsuit Yet. www.seekingalpha.com/article/4215387-exxon-mobil-hit-important-climate-lawsuityet. Accessed 15.8.2022.
307 Case 3:16-cv-03111-L, 7 November 2016. US District Court of Texas.
308 Bruno. Page 705.
309 Bruno. Page 706.

regulation oriented. Bruno has characterized this as market orientation vs. a regulation orientation.[310] In the U.S. the language in which risk management is handled with is that of fiduciary duty, within EU it is that of disclosure regulation. For the purposes of this thesis, however, it useful to mirror the U.S. discussion on fiduciary duty, as legal transplants is an ongoing phenomenon in corporate law and fiduciary duty as well.[311] [312] [313] [314] [315] As pointed out above, the concept of fiduciary duty is in use in all major jurisdictions nowadays. In addition, also the EU has regulation directly utilizing the concept of fiduciary duty. For example, the much politically debated Taxonomy with its Delegated Acts, albeit voluntary to apply, is expected to have influence on "greening" investment for climate mitigation purposes. In its Communication, the European Commission states:

> *"By amending existing rules on fiduciary duties in delegated acts for asset management, insurance, reinsurance and investment sectors, the Commission is clarifying the current rules to also encompass sustainability risks such as the impact of climate change and environmental degradation on the value of investments.*[316]

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[310] Bruno. Page 719.
[311] von Nessen, Paul. The Americanization of Australian Corporate Law, 26 SYRACUSE J. INT'L L. & COM. 239. 1999.
[312] Chodosh, Hiram E. Reforming Judicial Reform Inspired by U.S. Models, 52 DEPAUL L. REV. 351. 2002.
[313] Dezalay, Y., & Garth, B. G. Dealing in virtue: international commercial arbitration and the construction of a transnational legal order. University of Chicago Press. 1996.
[314] At least since 2010s, business judgment rule as a legal transplant has been operative law in Finland. (HE 32/2012 vp) Since the updating of the Finnish Companies Act in 2006, it took a clear turn towards the anglo-american direction and away from the Nordic tradition.
[315] See for example Langer, Máximo. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure. 45 Harv. Int'l L.J. 1. 2004.
[316] European Commission. COM(2021)188. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0188&from=EN. The delegated acts in question are Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ L 87, 31.3.2017, p. 1.; and Commission Delegated Regulation (EU) 2017/2359 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products, OJ L 341, 20.12.2017, p. 8. The Taxonomy is a part of a bigger EU agenda of the European Green Deal striving combine climate action, economic growth and new work for Europe.

4.5.1 The EU solution for oversight: European Directive (EU) 2014/95

In addition to the Taxonomy, older legislation exists to acknowledge and mitigate the financial effects of global warming. This is one of the aspects of the European Directive N. 2014/95/EU requiring disclosure on the policies adopted by big corporations on climate change risks and opportunities, although the contextual longer term goal has been the Commission's wider corporate social responsibility (CSR) agenda.[317]

Disclosure is the instrument through which directors are bound to exercise skill and care, and to explain their risk taking.[318] Since 2018, as the Directive came into force, big corporations have been required to publish the impact of environmental matters, among other factors, in short, medium and long term on corporate strategy and activity, including science-based climate change.[319] Big corporations refer to companies exceeding 500 employees. According to the Article 1(1) inserting Article 19 a (1), the four pillars of information are business model, policies and due diligence, outcome of those policies, risks and their management.

In case a company does not pursue any policy, that decision must be argued for clearly and reasonably.[320] As of June 2019, the content of climate-related information to be provided in the non-financial disclosure statement has been further regulated by the non-binding Guidelines given by the European Commission. These are a supplement to earlier Guidelines on Non-Financial Reporting adopted by the Commission in 2017.[321] Inter alia, these Guidelines invite corporations to analyze not only the impact that global warming and climate action have on business (outside-in), but as well the negative impact the business

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[317] Korca, Blerita and Costa, Ericka. Directive 2014/95/EU: building a research agenda. Journal of Applied Accounting Research. ahead-of-print. 10.1108/JAAR-05-2020-0085. 2021. Pages 401-402.

[318] Bruno. Page 687.

[319] See in Article 1(1) inserting Article 19 a (1). In the European Commission Communication N. 2017/C215/01, 8, 9 clarification is given for reporting of "non-financial information" referred to by Directive (EU) 2014/ 95. "Environmental matters" is given meaning as stated above in the text.

[320] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance. Article 1(1) inserting Article 19 a (1).

[321] Guidelines on Non-Financial Reporting adopted by the Commission in 2017 (C(2017) 4234 final)

has on climate itself (inside-out).[322] The Guidelines integrate TCFD recommendations referred to above, and paraphrase the briefing of the EU Technical Group on Sustainable Finance.[323] Bruno asserts that by requiring disclosure on climate risk and opportunity, the Directive de facto governs the corporations climate strategy indirectly. Because of the requirement to describe the business model, the board of directors has to plan the company strategy in relation to the short, medium and long term climate environment. Especially the long term requirements, Bruno notes, is longer than usually considered in strategic planning. Business model description includes financial planning and a full risk and opportunity analysis.[324]

The second and third pillars of information, policies and due diligence, and outcome of policies, command, with the duty of oversight, the processing of the company policies and control the disclosure of the outcome of those policies. The fourth pillar explicitly commands disclosure on risk management, for what process the board of directors is responsible for in short, medium and long term. Bruno goes on to argue that to fully comply with the duty of care, material risks and opportunities must be analyzed in the context of the TCFD Recommendations and disclosed to the market following the European Commission Guidelines. Moreover, she concludes, the Directive in this way impact the contents of duty of care in areas of strategic planning, oversight, risk management and decision making *in all European jurisdictions.*[325] Through disclosure, climate governance is a mandatory aspect of corporate governance within the EU.

The Directive leaves ensuring compliance to the member states. There is, however, a requirement for a statutory auditor or audit firm to verify that non-financial statement is produced. The content of the statement is not controlled. Member states may require that the information provided is verified by an independent assurance service provider.[326] Jeffery et al. has compared the non-

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322 European Commission Communication, Guidelines on Non-financial Reporting: Supplement on Reporting Climate-related Information, 2019/C 209/1, 20 June 2019. Page 4.
323 EU Technical Expert Group on Sustainable Finance, Report on Climate-related Disclosures, January 2019.
324 Bruno. Page 716.
325 Bruno. Page 717.
326 Directive (EU) 2014/95, Article 1 inserting Article 19 a (5) (6).

compliance regulations of UK, Germany, France and Italy. In the first two, it is a criminal offence to neglect the duty to prepare and publish the non-financial information statement; in Italy, an administrative monetary penalty and in France, any interested party may request a judge to order the information to be provided.[327] In Finland, an omission in accounting documentation a part of which the non-financial statement is, may be a criminal offence if it results in providing a flawed or imperfect image of the company's financial position.[328] These consequences come on top of directors' civil liability for misstatements or breach of fiduciary duties of skill and care, good faith and due diligence.

The Non-Financial Directive N. 2014/95/EU does not cover fiduciary duties in its scope, but is limited to disclosure for specific actions and groups. Directors' duties and the organization of companies in general is regulated by each member state, not by the European Union. Yet, a common principle of director duty of care and loyalty applies in all EU member states.[329] [330] [331] This comes on top of the legal and political message that the Directive itself sends. In its Guidelines to fulfill duty to disclose climate-related information, the Commission points out that the disclosure and analysis of climate risk benefits the company itself, and aids it to steer its strategy and business decision making accordingly.[332] This helps the directors directly in fulfilling their climate-related duty of care in acquiring and analyzing all relevant information in good faith in order to be able to advance shareholder interest.

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[327] Jeffery, Claire. Comparing the Implementation of the EU Non-Financial Reporting Directive in the UK, Germany, France and Italy. Frank Bold. 2017. Page 6.
[328] Criminal Code. 10:9-10.
[329] See Davis, Paul L. and Hopt, Klaus J. Corporate Boards in Europe – Accountability and Convergence", The American Journal of Comparahtive Law 61. 2013. In Finland, the fiduciary duties are understood through the concept of due diligence, and liability is arranged through tort law theory.
[330] Gerner-Beurle, Carsten and Schuster, Edmund, P. Mapping directors' duties: strategies and trends in Europe, in: Birkmose, Hanne S. et al. ed., Boards of Directors in European Companies: Reshaping and Harmonising Their Organisation and Duties. Kluwer Law International. 2013. Page 13.
[331] Rapakko, Timo. Osakeyhtiöoikeuden huolellisuusvelvoite kehittyneillä pääomamarkkinoilla. Lakimiesliiton kustannus. Helsinki. 1990. Page 83.
[332] European Commission Communication. 2019/C 209/01. Page 3.

4.7 Conclusions: making room for climate risk management within the scope of fiduciary duties

As concluding remarks, it should firstly be stated that the business judgment rule dominates the fiduciary duty case law. It has a strong status in American jurisprudence. Fiduciary duties are designed to be obligations of conduct that can be fulfilled in many different ways depending on the company. The business judgment rule allows for much discretion of directors. At the same time, it is clear that the content of the duties of care, loyalty and oversight are and were always meant to evolve according to the conditions in the real world.[333] These duties are open-ended and able to develop.[334] Fiduciary duties are dynamic in nature and will continue to evolve in substance according to the needs of the society – not least in response to the need to adopt an environmentally sustainable financial system.[335] If it is difficult to show substantive duties, the point of rule of conduct is to achieve reasonable behavior under all circumstances.[336] Fulfilling fiduciary duty, then, requires at the very principle, the very close observation of the natural, political, legal, market and other environments. This is good news for climate litigants, as all of these environments are evolving quickly due to the unraveling ecocatastrophe.

In addition, the business judgment rule protection does not activate if a risk is ignored.[337] Climate is a material risk, and the most significant event of the century. Law follows reality, and as the EU approach in disclosure regulation shows, the key term in incorporating climate-compatible business models is risk. If the business judgment rule and the current interpretation of fiduciary duties lead to absurd results, say, in more ill-advised investment in fossils, lawyers, courts and lawmakers are in the position to develop the legal rules to serve the needs of societies.

[333] Benjamin. 2020. Page 347.
[334] Hemingway, Joan M. Shareholder Wealth Maximization as a Function of Statutes, Decisional Law and Organic Documents, 74 WASH. & LEE L. REV. 2017. Pages 939 and 947.
[335] Sullivan, Rory. Martindale, Will. Feller, Elodie. Bordon, Anna. Fiduciary duty in the 21th century final report. UNEP. 2019.
[336] Bruno. Page 700.
[337] Bruno. Page 699.

Continuing the logic of court reluctance to assess business decisions materially because the directors of the company have the best possible information and judgment to make best decisions, it is with the company directorship where the responsibility for poor decisions resides. As Benjamin concludes, a trend for greater legal liability for corporations in relation to climate is emerging, and specifically in the context of risk disclosure and fiduciary considerations related to the action taken to mitigate the risk.[338] Failure of disclosure of relevant climate information, and the failure to take adaptive action based on are the likely bases for litigation.[339] It is true that even if material legal obligations are still debatable, the growing pressure and litigation risk from shareholders may impact director behavior even without litigation taking place. Within the EU, the litigation risk is higher, as failing to disclose and take action on climate risk breaches the Directive N. 2014/95 disclosure obligations in addition to directors' fiduciary duties.

5. Arbitration and risk mitigation

Turning to the last sub-argument of this thesis, the importance of access to arbitration as a way to mitigate risk and to fulfill the duty of care is discussed. This is to complete the argument that looking at the meaning of fiduciary duties as they stand in the 2020s, added with the cancellation of the possibility to utilize investment arbitration to mitigate climate risk in fossil investment, no more fossil investment can be done within the EU.

The objective of including dispute settlement mechanisms into trade and investment treaties is historically two-fold. From the host state perspective, the mechanism was to serve as a solution for credibility and commitment problems, and to attract investment. From the home state viewpoint, the goal was to depoliticize foreign investment. It is disputed, whether the mechanism has been successful in achieving neither of the goals.[340] Jandhyala discusses the spillover effects for multinational firms. In strategic management and international business

[338] Benjamin. 2020. Page 375.
[339] Benjamin. 2020. Page 379.
[340] Jandhyala, Srividya. The Politics of Investor-State Dispute Settlement: How Strategic Firms Evaluate Investment Arbitration. In: Chaisse, J., Choukroune, L., Jusoh, S. (eds) Handbook of International Investment Law and Policy. Springer, Singapore. 2020. DOI.org/10.1007/978-981-13-5744-2_72-1. Page 2.

literature it has become clear that companies employ a variety of political risk management strategies. Access to investor-state arbitration has become one of those strategies.[341]

In order to assess the significance of the *Achmea/Komstroy* case law from the point of view of direction of company, the general significance of availability of investor-state arbitration in director business decision making must be discussed. It is challenging or impossible to find out the exact weight of such factors when companies deliberate their general strategy and material business plans, but some attempt must be made to sketch out the importance of the tool. Jandhyala assesses the importance of the tool based on a selection of approaches. Survey evidence suggests that many firms, also among the largest ones, are unaware of arbitration.[342] Similarly, a survey of big multinational corporations found investment arbitration to be an inefficient tool to mitigate political risk.[343] In another study, only about 15% of the companies studied were either familiar with the investment arbitration system, or believed it would be a factor in the investment environment of the host state.[344] The availability and pricing of a company political risk[345] insurance does not seem to be related to the access to investor-state arbitration.[346] State investment promotion entities seldomly emphasize investor-state settlement in their marketing.[347]

Instead, Jandhyala discusses the large management literature in which company anticipatory strategies for managing political risk is analyzed. Entry, operational and political strategies are looked into. Entry strategies, include a choice of

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[341] Ibid. Page 1.

[342] Yackee, J.W. How much do U.S. corporations know (and care) about bilateral investment treaties? Some hints from new survey evidence. In: Columbia FDI perspectives, Vol 31. Vale Columbia Center on Sustainable International Investment. New York. 2010.

[343] MIGA (2013) World investment and political risk. World Bank, Washington, DC.

[344] St John, T. The rise of investor-state arbitration: politics, law, and unintended consequences. Oxford University Press. Kettering. 2018. Pages 20–21

[345] In essence, any policy change by the host government can be conceptualized as political risk. Jandhyala. 2020. Page 8.

[346] Poulsen, L.S. The importance of BITs for foreign direct investment and political risk insurance: revisiting the evidence. In: Yearbook on international investment law and policy. 2010. Pages 539–574.

[347] Yackee, J.W. Do Investment Promotion Agencies Promote Bilateral Investment Treaties? In: Bjorklun AK.(ed) Yearbook on international law and policy vol. 2013–2014. Oxford University Press. New York. 2015. Pages 529–552.

politically stable location, although the experience of stability is subject to the comparison with the stability level of the home state.[348] [349] If the company has experience in operating under diverse institutional conditions, the deterrence on entering politically risky states is lowered.[350] [351] Experienced political risk also influences the mode in which a company enters a market: as a joint venture of lower commitment, or as a sales distribution facility, for example.[352] With regards to operational strategies, it is noteworthy that companies with mobile investments are better positioned than natural resource or infrastructure investments.[353] Therefore, following the bargaining power logic, all energy sector firms are in a less favorable position in this aspect of operations, and must then employ other risk mitigation tools, such as investment arbitration. Political strategies in anticipatory risk management include close ties with the ruling elite of the host state from lobbying and campaign contributions.[354] [355] [356] This is true in the energy sector, as well, as cited literature shows.

5.1 Political risk

However, studies assessing these strategies define political risk in various ways. If defined as good governance, the EU member states should excel as relatively low political risk target countries.[357] In the cited study, only investments to developing

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[348] Flores R.G. and Aguilera R.V. Globalization and location choice: an analysis of US multinational firms in 1980 and 2000. J Int Bus Stud 38(7):1187–1210. 2007.
[349] Holburn G.L.F., and Zelner B.A. Political capabilities, policy risk, and international investment strategy: evidence from the global electric power generation industry. Strateg Manag J 31(12). 2010.
[350] García-Canal E., and Guillén M.F. Risk and the strategy of foreign location choice in regulated industries. Strateg Manag J 29(10). 2008. Pages 1097–1115.
[351] Jandhyala, Srividya. Property rights and international investment in information technology services. Strateg Manag J 34(7). 2013. Pages 877–889.
[352] Delios A., and Henisz W.J. Policy uncertainty and the sequence of entry by Japanese firms, 1980–1998. J Int Bus Stud 34(3). 2003. Pages 227–241.
[353] Kobrin, S.J.Testing the bargaining hypothesis in the manufacturing sector in developing countries. Int Organ 41(4). 1987. Pages 609–638.
[354] Fremeth A.R., Holburn G.L., and Vanden Bergh R.G. Corporate political strategy in contested regulatory environments. Strategy Sci 1(4). 2006. Pages 272–284.
[355] Holburn GL and Vanden Bergh R.G. Integrated market and nonmarket strategies: political campaign contributions around merger and acquisition events in the energy sector. Strateg Manag J 35(3). 2014. Pages 450–460.
[356] Ridge J.W., Ingram A., and Hill A.D. Beyond lobbying expenditures: how lobbying breadth and political connectedness affect firm outcomes. Acad Manag J 60(3). 2017. Pages 1138–1163.
[357] Lee H., Biglaiser G., and Staats J.L. (2014) The effects of political risk on different entry modes of foreign direct investment. Int Interact 40(5). 2014. Pages 683–710. These authors use rule of law, multiple veto players and assurance of democratic political stability.

countries were examined. The International Country Risk Guide uses 13 factors to analyze political risk. These are economic expectations versus reality; economic planning failures; political leadership; external conflict; corruption in government; military in politics; organized religion in politics; law and order tradition; racial and national tensions; political terrorism; civil war; political party development and the quality of bureaucracy.[358] For the purposes of assessing the political risk of climate action, this literature seems to be too focused on the more traditional setting of Global North investing in Global South. It is questionable, to what extent the existing literature is able to catch the dynamic of intra-EU energy investment.

Concluding, Jandhyala says even though under some conditions investment arbitration might play a significant role in a company's business decision making, it seems that the general importance of the tool is limited. This is argued for by looking into (survey) studies of what strategies companies disclose they do employ. Jandhyala argues, then, that investment arbitration can be significant tool not in the anticipatory stage of risk management, but when a political risk has actualized. Under those circumstances, the toolkit is more much more limited including trying to renegotiate the contract[359], seeking diplomatic assistance[360] or other stakeholder groups[361], and investor-state arbitration. The framing, however, is still that as the credibility and commitment problems function as a justification for the investment arbitration system, essentially it is used to mitigate investment risks.[362]

A notion about the discourse of the existing literature should be made. The language used refers to opportunistic state behaviour and assumes bargaining positions in which both the state and the company try to maximize their economic

[358] Erb, Claude B. et al. Political Risk, Economic Risk, and Financial Risk. *Financial Analysts Journal*, vol. 52, no. 6. 1996. Pages 29–46.
[359] MIGA (2013). Page 51.
[360] Gertz, G. Commercial diplomacy and political risk. Int Stud Q 62(1) 2018. Pages 94–107.
[361] Bach D., and Blake D.J. Frame or get framed: the critical role of issue framing in nonmarket management. Calif Manag Rev 58(3). 2016. Pages 66–87.
[362] Jandhyala. 2020. Page 7.

gain under changing circumstances.[363] [364] This is hardly a suitable framework for the climate action discussion. More research in this discourse is needed.

5.2 The regulatory chill discussion as a sign of investment arbitration's significance in managing political risk

Because of the lack of clear conclusions based on existing literature on the significance of investment arbitration as a risk management tool, I will utilize another scholarly debate to show it bears at least some significance. There is a lively scholarly discussion on whether investment arbitration causes regulatory chill or not.[365] [366] [367] [368] [369] [370] Much cited examples include New Zealand postponing its stricter tobacco legislation (plain packaging) for six and half years due to waiting for the result of an ongoing investment arbitration between Philip Morris and Australia.[371] [372] The mere threat of an ISDS arbitration caused the reversal of a ban on open-cast mining in a number of protected forests by the government of Indonesia.[373] A World Heritage Site nomination was asked to be cancelled by the government of Romania, due to a claim by a Canadian mining company.[374] States are afraid of big compensation sums. The biggest sum ever awarded is 50 billion dollars in the Yukos case[375], but billion dollar cases are not a

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[363] Vivoda, Vlado. Bargaining Model for the International Oil Industry. Business and Politics: Vol. 13: Iss. 4, Article 3. 2011. Page 1.
[364] Globerman, Steven and Daniel Shapiro. Canadian Government Policies Toward Inward Foreign Direct Investment. Working Paper 24. Industry Canada. 1998.
[365] 'The Arbitration Game', *The Economist*, (London, 11 October 2014).
[366] Surowiecki, James. Trade Agreement Troubles. *The New Yorker* (New York, 15 June 2015).
[367] Hamby, Chris. Inside The Global "Club" That Helps Executives Escape Their Crimes. *BuzzFeedNews* (28 August 2016).
[368] Koskenniemi, Martti. It's not the Cases, It's the System. 18 The Journal of World Investment & Trade 343. 2017.
[369] Arcuri, Alessandra. The Great Asymmetry and the Rule of Law in International Investment Arbitration. In Sachs, Lisa, Johnson, Lise and Coleman, Jesse. (eds), *Yearbook on International Investment Law and Policy 2018*. Oxford University Press. 2019.
[370] Van Harten, Gus, Kelsey, Jane and Schneiderman, David. Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter. Osgoode Legal Studies Research Paper. 2019.
[371] Kelsey, Jane. Regulatory Chill: Learnings from New Zealand's Plain Packaging Tobacco Law'. 17 QUT Law Review 21. 2017.
[372] Tienhaara, Kyla. Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement. 7 Transnational Environmental Law 229. 2018.
[373] Gross, Stuart G.Inordinate Chill: Bits, Non-NAFTA MITs, and Host-State Regulatory Freedom – An Indonesian Case Study. 24 Michigan Journal of International Law 893. 2003.
[374] World Heritage Committee of the World Heritage Convention's Decision 42 COM 8B.32 referring Romania's world heritage nomination Rosia Montana site back to Romania due to Romania's request 'due to the ongoing international arbitration'. See https://whc.unesco.org/archive/2018/whc18-42com-18-en.pdf. Accessed 26.8.2022.
[375] Russian Federation v Yukos Universal Limited, UNCITRAL, PCA Case No. 2005-04/AA227 ,Final Award)18 July 2014).

rarity.[376] [377] The Yukos claims were raised based on the ECT. The definitions of regulatory chill includes watering down, delaying or otherwise negatively influencing the guarding of public interest in decision-making.[378]

The investor side and many investment arbitration lawyers either do not recognize the regulatory chill risk or doubts its existence.[379] Another way of formulating the question from the company point of view is whether international arbitration is a functioning solution to mitigate political risk. Although this question remains open theoretically and empirically[380], in an empirical study on petroleum reserves, Jandhyala and Weiner found that corporations were willing to pay a significantly larger sum for reserves that were protected by an investment arbitration clause than those that were not.[381] As the study is from the energy sector, its results bear great significance to my argument. It looks like under some conditions, the availability of investment arbitration is a factor energy corporations use in business decision making.

Jandhyala has sketched out four different strategies corporations utilize investment arbitration in case of a dispute between the state and the company. Corporations use arbitration as an insurance, bargaining tool, enforcement tool for property right protection, and as policy freeze.[382] It seems warranted to argue, then, that the possibility to use investment arbitration is not only a theoretical but also broadly used tool that corporations utilize both in the stage of anticipating political risk, and later on to have leverage in the disputes that do arise. With the former conclusion about the anticipatory use, Jandhyala herself is more reserved, as the empirical literature on the topic has focused on the question of location-

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[376] See for example Venezuela Holdings and others v. the Bolivarian Republic of Venezuela, ICSID Case NO. ARB/07/27 (10 June 2010).
[377] Petrochemical Industries Companies (K.S.C.) v The Dow Chemical Company [2012] EWHC 2739.
[378] Ankersmit, Laurens. Regulatory autonomy and regulatory chill in Opinion 1/17. *Eur. World.* Vol. 4(1). 2020. DOI: 10.14324/111.444.ewlj.2020.25. Page 1.
[379] See for example http://arbitrationblog.kluwerarbitration.com/2020/07/23/ect-modernisation-perspectives-reforming-the-fair-and-equitable-treatment-protection/. Accessed 26.8.2022.
[380] Jandhyala Srividya, and Weiner R.J. Institutions sans frontières: international agreements and foreign investment. J Int Bus Stud 45(6):649–669. 2014. Page 650.
[381] Ibid. Page 668-9.
[382] Jandhyala. 2020. Pages 13-16.

choice. These studies do not offer a direct answer to the question of how much the availability of investment arbitration influences the business decision making more generally, or the strategic choice of *what* into invest in, rather than *where* to invest.[383]

In addition to the empirical argument, a normative argument from a company due diligence point of view supports the above conclusion. Seeking investment arbitration in the event of expropriation or a case of an investment dispute, the company leadership is bound to seek arbitration in order to advance the company interest in good faith. This was the case with Uniper leadership as well, as they explicitly explained.[384]

5.3 The significance of the ECT in managing political risk in energy investments within EU

The ECT is one of the most litigated investment treaties in existence, as cited above in section 2.3. It seems warranted to argue that in energy sector the conditions might be such that the presence of the ECT dispute settlement mechanism has indeed played a role in investment decision making. Further research on the topic is needed, preferably in a survey form for comparability. Moreover, NGOs like ClientEarth claim that the ECT is being utilized strategically to halt climate action globally.[385] [386] Indeed, in a legal opinion about the Uniper litigation threat submitted to the Dutch senate, ClientEarth states:

> "Uniper's litigation threat illustrates how fossil fuel companies may seek to use ISDS to shift their losses from stranded assets onto states and seek compensation for poor business decisions. It also shows the detrimental

383 Jandhyala. 2020. Page 17.

384 https://yle.fi/news/3-11911533. Accessed 26.8.2022. However, from a company risk management point of view, Hyvärinen's statement that Fortum/Uniper is not opposed to the Netherlands banning coals, seems untrue. Clearly, when investing in a new coal plant in the Netherlands, the risk analysis has been that coal will not be banned in the near future and the investment will be profitable.

385 https://www.clientearth.org/latest/press-office/press/companies-cannot-use-ect-to-sue-governments-for-climate-progress-top-court-says/. Accessed in 16.8.2022.

386 https://waronwant.org/news-analysis/energy-charter-treaty-threat-climate-action#:~:text=All%20over%20the%20world%2C%20the,pipelines%20and%20fossil%20fuel%20taxation. Accessed in 16.8.2022.

> impact ISDS could have on climate policy if States bend to these threats."[387]

The connection between poor climate risk management and using investment arbitration as a tool seems evident. The other way to interpret the climate risk taking is that it is gambling, and the ECT dispute settlement mechanism has been the ace in the hand. As discussed in section 3, this game is now over in the EU. Climate risk has to be managed in other ways by directors, the obligations stemming from fiduciary duty and EU disclosure regulation, added with the human rights aspects left outside the scope of this thesis.[388]

6. Concluding remarks

The EU leadership in climate action has a convincing track record in global comparison, regardless of its shortcomings. This is visible is the coherent and strategic way climate risks are analyzed by the EU political institutions, especially by the Commission and Parliament. Also the policy conclusions seem coherent and convincing, including the 2018 Action Plan on Sustainable Growth with its detailed identification of future legislative steps to reach a sustainable economic system. In addition, the explicit recognition of unburnable coal, oil and gas owned by publicly listed companies up to 60-80% of the total is a remarkable policy premise.[389] This track record should prevent future argumentation of reasonable expectations of legal stability and lack of additional climate mitigation policy and legal instruments. In this way, EU climate law and policy are considered as "facts" by arbitral tribunals.[390] [391] For past investments, depending on the point in

[387] ClientEarth letter and analysis regarding UNIPER ISDS threat. 27 November 2019. https://www.clientearth.org/latest/documents/clientearth-letter-and-analysis-regarding-uniper-isds-threat/. Accessed in 16.8.2022.
[388] Williams, Cynthia. Fiduciary Duties and Corporate Climate Responsibility. VANDERBILT LAW REVIEW [Vol. 74:6:1875]. 2021. Page 1908.
[389] Committee on Economic and Monetary Affairs of the European Parliament Draft Report, 2 February 2018.
[390] Watkins Holdings S. r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award (21 January 2020). Paragraph 527.
[391] Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic, PCA Case No. 2014-21, Award (15 May 2019). Paragraph 522.

time they were made, this line of argumentation is applicable to a more limited extent.[392] [393]

The Commission and the EU really do believe in green capitalism. In this light, the Commission driven and CJEU executed agenda of ending intra-EU investment arbitration in relation to the ECT seems logical. Moreover, it seems clear that if not already now, at least in the coming years it will be impossible for directors to simultaneously fulfill the requirements of the Directive N. 2014/95/EU, act in good faith in the interest of a company fulfilling the fiduciary duties of loyalty, care and oversight, and yet cast shareholder money on fossil investments.

An unresolved dilemma is, what meaning is given to the core obligation of company directorship: in what time frame is the obligation to advance the interest of the company? In literature, as discussed above in section 4.1, it has been proposed that the time frame required is long term value of shareholder investment. As the Tragedy of Horizon and the green paradox exemplify, however, this is not the code of conduct followed in reality. The EU approach of requiring disclosure in short, medium and long term non-financial strategy and risk mitigation might prove to push forward the longer time horizon thinking in business, too.

The result of assessing the two issues posed in section 1.3; the significance of mitigating climate risk in fulfilling the fiduciary duty, and the significance of investment arbitration in mitigating company political risk, yield the following conclusion: The significance of climate risk mitigation in successfully fulfilling director fiduciary duties, especially in the EU, is growing. A strict legal yardstick is, however, missing. The significance of investment arbitration in mitigating political risk in energy sector is great, and energy companies operating in the EU are now missing a significant tool. It is noteworthy that the EU has no attempt to hamper investment protection in general – only fossil investments cease to be protected under the ECT as that is contrary to EU climate law and policy. For EU

[392] Eckes, Christina. The Courts strike back, Verfassungsblog 2021. https://verfassungsblog.de/the-courts-strike-back/. Accessed 25.8.2022.
[393] Eckes and Ankersmit. Page 18.

based directors, it seems like a lost quest to defend their decisions to further fossils investments. The exact point in time since when this is true is, the latest, *Komstroy* decision, September 2nd 2021.

Afterword

The war in Ukraine has caused an acute energy crisis in Europe. Currently, as a counteraction to Russian warfare, investments in gas sources outside Russia are being made. The arguments against the legality of fossil investments within the EU made in this thesis still stand, I believe, but fossil gas would have to be left out for now, and possibly for a longer period time.

The war has surpassed the climate emergency in political priorities, which has impact on law as well. With time, it becomes more and more difficult to surpass the climate with any other pressing crisis. Hopefully it is not too late to act effectively, when that point in time is reached.